No.

In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, PETITIONER

v.

IRVING KAHN AND MINNIE KAHN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

498-649—73——1

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the suppression of evidence obtained as a result of court authorized wire interception conducted pursuant to 18 U.S.C. 2510–2520 (Title III of the Omnibus Crime Control and Safe Streets Act of 1968).

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 471 F. 2d 191. The opinion of the district court (App. C, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1972. An order denying the government's timely petition for rehearing was entered on January 29, 1973 (App. B, *infra,* p. 21a). By order of February 20, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 30, 1973. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, a person whose identity as a possible user of a telephone is known but whose involvement in illegal use of that telephone is not known at the time, comes within the class of persons who must be identified in a wiretap application and order "if known", so that the interception of incriminating conversations of such a person under an order allowing the monitoring of the conversations of a specified person and "others as yet unknown" over specific telephone numbers must be suppressed.

2. Whether, under an order authorizing the interception of communications "of [the person being investigated] and others as yet unknown," conversations to which the person being investigated was not a party may properly be intercepted.

STATUTES INVOLVED

18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral

communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * * * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including * * * (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

* * * * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * * * *

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

STATEMENT

On March 20, 1970, Judge William J. Campbell of the United States District Court for the Northern

District of Illinois issued an order pursuant to 18 U.S.C. 2518 authorizing the interception of conversations of "Irving Kahn and others as yet unknown" over two telephones in the Kahn residence in connection with a gambling investigation; Irving Kahn's wife Minnie was not mentioned. The order required that a status report be filed within five days. The report filed with Judge Campbell on March 25, 1970, indicated that the interception had been terminated because the objective had been attained. It also gave a summary of the information obtained from the interception, stating in part that on March 21, Irving Kahn made a telephone call from Arizona to his wife in Chicago and discussed gambling wins and losses. On the same day Mrs. Kahn made two telephone calls from the intercepted telephone to a known gambling figure and discussed numbers and amounts of bets placed and the identification of bettors (App. A, *infra*, pp. 2a–3a).

Respondents Irving and Minnie Kahn were subsequently charged in an indictment with using a facility in interstate commerce to promote, manage, and facilitate an illegal gambling business in violation of 18 U.S.C. 1952. The government notified respondents that it intended to introduce in evidence telephone conversations which had been intercepted pursuant to the court order. Respondents filed motions to suppress the wiretap evidence. These motions were heard by a different judge, Judge Thomas R. McMillen. On November 2, 1971, Judge McMillen entered an order suppressing any conversations exclusively between Irving and Minnie Kahn as being

within the "marital privilege". He also suppressed any conversations between Minnie Kahn and others as being outside the scope of Judge Campbell's order (App. C, *infra*).

The government appealed this order and on October 31, 1972, a divided panel of the court of appeals affirmed that part of the district court's order suppressing conversations of Minnie Kahn but reversed that part of the order based on "marital privilege" (App. A).[1]

The majority held that, under the district court's order, there were two requirements which all intercepted conversations had to satisfy before they could be admitted into evidence (App. A, *infra*, p. 9a):

> 1) that Irving Kahn be a party to the conversations, and
>
> 2) that his conversations intercepted be with "others as yet unknown".

The majority then construed the statutory requirements of 18 U.S.C. 2518(1)(b)(iv) and 2518(4)(a) for identification of the person, if known, whose communications are to be intercepted to exclude from the definition of "others as yet unknown" any "persons whom careful investigation by the government would disclose were probably using the Kahn telephones in conversations for illegal activities" (App. A, *infra*, p.

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[1] One judge concurred in the result but would also have held the marital privilege applicable. The dissenting judge agreed that the marital privilege was inapplicable but disagreed with the holding that the conversations of Minnie Kahn were not within the scope of the order of interception and would have reversed the suppression order.

10a). The majority then concluded that (App. A, *infra*, p. 12a):

> * * * the government has not shown that had it conducted its investigation with the care Congress intended to protect personal privacy, it would not have discovered whether or not Minnie Kahn had implicated herself by her conversations.

The majority stated that in view of the failure of the government to discover Mrs. Kahn's complicity in the gambling activities or to justify the failure to attempt to discover it by the time of the application, "the subsequent wiretaps amounted to a virtual general warrant in violation of her Fourth Amendment right" (App. A, *infra*, p. 12a).

Judge Stevens in dissent pointed out that the wiretap order in this case authorized interception over the two specified telephones of "communications *of* Irving Kahn and others as yet unknown", not conversations *between* Kahn and others, and that, considering the language of the issuing judge's findings and of the order, it was "clear that the intercept authority was not limited to conversations to which Irving Kahn was a party" (App. A, *infra*, p. 16a). He further stated that the majority's interpretation of the "if known" language of section 2518(1)(b)(iv) and section 2518(4)(a) to include persons whom further investigation would disclose were probably using the specified telephone illegally was inconsistent with the statutory scheme. Moreover, he pointed out, "there is nothing in the record to support an inference that the government should have known that Minnie Kahn * * *

would use Irving's telephones to transmit gambling information to a third party while he was out of town" (App. A, *infra*, pp. 18a–19a). Finally, Judge Stevens said that the requirement of exhaustion of normal investigative techniques before applying for the wire interception order (18 U.S.C. 2518(3)(c)) was met and that the majority incorrectly confused this requirement with the identification requirements of 18 U.S.C. 2518(1)(b)(iv) and 2518(4)(a) (App. A, *infra*, pp. 19a–20a).

The government petitioned for rehearing, contending that Judge Stevens' dissent was the correct statement of the law. Respondents also petitioned for rehearing claiming that the marital privilege should have been found to apply and requesting clarification of the court of appeals' opinion to indicate more precisely which conversations had been ordered suppressed. On January 29, 1973, the court of appeals denied both petitions for rehearing (App. B, *infra*, p. 21a).[2]

REASONS FOR GRANTING THE WRIT

The majority in this case has construed an important new statute in a manner inconsistent with the language and intent of Congress. Furthermore, the decision below is in conflict with decisions in other circuits. If allowed to stand, it would severely undercut the effectiveness of court-authorized wiretapping

[2] Respondents are also petitioning for a writ of certiorari (No. 72–1194) to review that part of the decision below that holds that conversations between them were not covered by a "marital privilege". We intend to oppose that petition.

and thwart the congressional intent in permitting the use of this important law enforcement tool.

1. The majority opinion raises the question who must be identified in a wiretap application and order under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. In wiretap situations there are generally three classes of persons involved: First, the person or persons against whom the investigation is directed and probable cause is shown. Second, other known users of the target telephones, such as family members or other frequenters of the premises, about whom there is no probable cause to suspect complicity in criminal activity. Thirdly, there are those other persons with whom the target of the investigation will be conducting the particular communications sought to be intercepted. Some of the persons in this third group may be known to some degree, but a showing of probable cause to intercept their specific conversations on the target telephone has not heretofore been thought to be necessary in the application.[8]

It is our position that only persons in the first group need be identified in the application and order, and that communications of those in the second and third group may be lawfully intercepted regardless

[8] In this case, for example, the affidavit supporting the wiretap application states that information was received from a reliable source that petitioner Irving Kahn was taking lay-off bets from a Joe Solutin in Anderson, Indiana. Since this shows that Solutin was known and his involvement in the offense was at least probable, the reasoning of the majority might preclude the use of any conversations involving Solutin since he would not come within the majority's definition of "others as yet unknown".

of whether the identified party participates. As Judge Stevens pointed out in dissent, the standard wiretap-order language used here permits interception of the conversations of the identified party "and of others as yet unknown", not only the conversations between the identified party and the others.

The decision below holds that the fruits of a wiretap order issued upon a finding of probable cause must be suppressed to the extent that they include incriminating conversations of a person not named in the application and order if that person's use of the subject telephone could have been anticipated and if the government failed to establish at the time it applied for the order that (1) it had fully investigated the possibility that the person was engaged in illegal activities and (2) had concluded the person was not implicated. This decision misapprehends the thrust of the identification requirements established by Congress. The statute does not demand the superfluous inclusion of the name of every person who might be expected to be using the tapped phone. Instead, Section 2518(1)(b)(iv) simply requires that the application include "the identity of the person, if known, *committing the offense* and whose communications are to be intercepted" (emphasis added). Carrying forward the focus on the particular person actually suspected of criminal involvement, Section 2518(4)(a) requires that the order specify "the identity of the person, if known, whose communications are to be intercepted." Thus, there is simply no textual basis for imposing a requirement that an application or order exhaustively list every person who might be expected to be heard

or a requirement that those whose complicity "should have been discovered" by a full investigation prior to the application must be specified.

Under the Fourth Amendment, a search warrant which particularly describes the property to be seized is sufficient even if the owner of the property is not named. See *Hanger* v. *United States*, 398 F. 2d 91, 99 (C.A. 8), certiorari denied, 393 U.S. 1119; *Miller* v *Sigler*, 353 F. 2d 424, 428 (C.A. 8), certiorari denied, 384 U.S. 980; *Dixon* v. *United States*, 211 F. 2d 547, 549 (C.A. 5). There is no indication that Congress intended to change this rule by the identification provisions of 18 US.C. 2518(1)(b)(iv) and 2518(4)(a). All Congress required was that the application for the interception order provide the identity of the person committing the offense if that identity is known. Here the order did just that, naming Irving Kahn. The opinion of the majority would change this rule, and instead require the government to name in the application and order those other persons who might be intercepted over the target telephone, or alternatively require it to meet an additional burden of showing why the involvement of those persons was not known and should not have been known prior to issuance of the interception order. But, as Judge Stevens pointed out in dissent, "it seems unlikely that the 'if known' requirement of § 2518(4)(a) was intended to impose * * * an additional exhaustion requirement * * *" (App. A, *infra*, p. 20a).

2. The government's position in this case is essentially that expressed by Judge Stevens in dissent. Al-

though Mrs. Kahn's existence as a member of the Kahn household could have been known and her possible use of the intercepted telephone could have been anticipated by the agents prior to requesting the interception order, there is nothing in the record to suggest that her involvement in the gambling business was, or should have been, similarly known. Nor is there any requirement in the statute that each member of a household or other possible user of the telephone must be investigated prior to requesting an interception order when there is no reason to know of their criminal involvement.

Although in this case Mrs. Kahn was a person whose communications were made from the target telephone, the broad language used by the majority could be construed to apply to a person outside the household called from, or calling to, the target telephone. The majority's erroneous superimposition of the "exhaustion" requirement of Section 2518(3)(c) onto the "if known" requirements of Section 2518 (1)(b)(iv) and 2518(4)(a) could prohibit the government from introducing evidence of any conversation in which one of the parties to the conversation was not named in the order unless the government could prove that the involvement of the person not named in the order could not have been discovered prior to the wire interception.[4] Neither the Constitu-

[4] The majority opinion does suggest, in dicta, that some communications might be admissible against a named party, but not against the unknown party under their interpretation of the statute (App. A, *infra*, p. 13a).

tion nor the letter or spirit of the statute requires such a constricting result.

3. The reasoning of the majority is in conflict with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Fiorella*, 468 F. 2d 688, pending on petition for a writ of certiorari, No. 72–863. In *Fiorella* the Second Circuit specifically rejected the argument that a court authorization to intercept wire communications of certain named persons and "others as yet unknown" constituted a general warrant. The court below expressly concluded, however, that monitoring the conversations of Mrs. Kahn under the "others as yet unknown" portion of the order, without having justified the failure to learn of her involvement before seeking the court order, "amounted to a virtual general warrant" (App. A, *infra*, p. 12a).

The decision of the majority here is also inconsistent with the reasoning of the Tenth Circuit in *United States* v. *Cox*, 449 F. 2d 679, 685–687, certiorari denied, 406 U.S. 934, and the Eighth Circuit in *United States* v. *Cox*, 462 F. 2d 1293, 1300–1301, pending on petition for a writ of certiorari, No. 72–5278. In the Tenth Circuit's *Cox* desion, communications in which neither of the parties to the conversation was specifically named in the order were introduced in evidence. The court of appeals nevertheless upheld the admissibility of those conversations, even though they concerned an "unanticipated" offense other than the one specified in the order. In the Eighth Circuit's *Cox* case, the court held

that interception of *all* communications over the designated telephone during the authorized period of interception was proper. These decisions, therefore, unlike the decision below, adopt a reasonable and practical test for admitting into evidence incriminating conversations not anticipated at the time the court order was sought and granted, if the order is otherwise valid.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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MARCH 1973.

APPENDIX A

In the United States Court of Appeals
for the Seventh Circuit

No. 71-CR-174

No. 71-1931 SEPTEMBER TERM, 1971—APRIL SESSION, 1972

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

IRVING KAHN and MINNIE KAHN, DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Argued June 1, 1972—Decided October 31, 1972

THOMAS R. MCMILLEN, *Judge.*

Before KNOCH, *Senior Circuit Judge,* KILEY and STEVENS, *Circuit Judges.*

KILEY, *Circuit Judge.* The government has appealed [1] from an order of a district judge suppressing as evidence conversations between Irving and Minnie Kahn, husband and wife, gathered from wiretaps authorized by a district judge's order permitting interception of their telephone communications by virtue of the provisions of Title III of the Omnibus Crime

[1] 18 U.S.C. § 3731, 18 U.S.C. § 2518(10)(b).

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Control and Safe Streets Act of 1968.[2] We affirm in part and reverse in part.

On March 20, 1970 the judge issued the wiretap order on application of the government, through a specially designated Assistant Attorney General, supported by an FBI agent's affidavit.[3] The order authorized interception of Irving Kahn's conversations with "others as yet unknown" using the two Kahn home telephone numbers. Minnie Kahn was not named in the order. The government presumed the order authorized interception of her conversations as a member of the class of "others as yet unknown." The judge accepted the FBI status report he required under authority of § 2518(6) of the Act[4] and presumably approved the government's interpretation of the order.

The order cautioned that execution of the order should be as "soon as practicable" and "in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code,[5] and must terminate upon attainment of the authorized objective or, in any event, at the end of fifteen (15) days from the date of this order." On March 25, 1970 the government reported the interception had been terminated by attain-

[2] 18 U.S.C. §§ 2516 and 2518.

On the basis of the same affidavit supporting the eavesdrop order, the district judge the same day authorized use of a Pen Register. No question is raised in the appeal with respect to the Pen Register.

[3] 18 U.S.C. §§ 2516 and 2518.

[4] (6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

[5] 18 U.S.C. §§ 2510–2520.

ment of the objective. The report[6] stated the objective was attained by gathering information, *inter alia,* that on March 21, 1970 Irving Kahn called his wife from Arizona and discussed gambling wins and losses, and that the same day Minnie Kahn called a known gambling figure twice and discussed numbers and amounts of bets placed and the identity of the bettors by numbers.

On February 24, 1971 Irving and Minnie Kahn were indicted for using a telephone "facility in interstate commerce" with intent to promote gambling in violation of Illinois law. On April 27, 1971 the Kahns filed motions to suppress the wiretap evidence pursuant to 18 U.S.C. § 2518(10)(a).[7] The joint motion asserted

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[6] On March 10, 1971 an order was entered authorizing the FBI, in possession of tape from the eavesdropping, to break the seal, make copies of recordings and supply the defendants' counsel with a copy.

[7] (10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for evidence such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

that the Kahns' Fourth and Fifth Amendment rights were violated by the wiretaps. It also challenged the sufficiency of the application for the order, the necessity for the order and the FBI use of telephone company records allegedly in violation of 47 U.S.C. § 605 and 18 U.S.C. § 2515, the duration of the order, and its excessive breadth. The Kahns also challenged the order for its lack of directions for minimizing interception, and alleged that it violated the marital privilege under the Ninth Amendment, the common law and 18 U.S.C. § 2517(4).[8]

The judge[9] found that the Attorney General's application for the intercepting order was adequately supported by the FBI agent's affidavit and that the order was valid and enforceable under 18 U.S.C. § 2518(3–5).[10] The judge further found that the statute

[8] (4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

[9] The criminal case was assigned to a district court judge other than the judge who authorized the wiretap.

[10] (3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral com-

authorizing the wiretap order was "undoubtedly" constitutional when limited to conversations participated in by "Irving Kahn with persons unknown at the

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munications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

time." However, the judge, without hearing testimony, suppressed any conversations "exclusively" between Irving and Minnie Kahn as being within the marital privilege doctrine as applied through 18 U.S.C. § 2517 (4). The judge also decided that the wiretap order did not authorize interception of Minnie Kahn's conversations. The government's appeal followed.

I.

The government contends that the judge erroneously applied the marital privilege rule because (1) Minnie Kahn was not testifying against her husband, and (2) the privilege in this proceeding must give way to the public interest in discovering the truth about crime, and in enforcement of criminal law.

We agree with the government. If the intercepted conversations had to do with the commission of a crime and not with the privacy of the Kahn marriage, the judge's ruling is erroneous. Society has an interest in protecting the privacy of marriage because invasion of the privacy endangers the family relationship. The privilege has been interpreted in some jurisdictions to exclude conversations between spouses about business, since their role as spouses is merely incidental.[11] That rule reinforces the exception to the privilege; "[w]here both spouses are substantial participants in patently illegal activity, even the most expansive of the marriage privileges should not prevent testimony."[12]

This court recently, in *United States* v. *Doughty*, 460 F.2d 1360, 1364 (7th Cir. 1972), said:

> The Doughtys were in the unlawful enterprise together, and we think it highly unlikely

[11] Annot., 4 A.L.R. 2d 835.

[12] Note, *Future Crime or Tort Exception to Communications Privilege*, 77 HARV. L. REV. 730, 734 (1964).

> that the court's admission of the testimony [of an agent] . . . militated against their domestic peace or offended the public interest which the rule in *Hawkins* [358 U.S. 74 (1958)] sought to protect.

That language reflects Exception (2)(e) of UNIFORM RULE OF EVIDENCE 28; see also *United States* v. *Pugliese,* 153 F. 2d 497, 500 (2nd Cir. 1945).[13] We realize that "the law of evidence has demonstrated a degree of solicitude toward the intimacy of marriage not manifested with regard to other protected relationships," [14] but the conversations before us between the Kahns were with respect to ongoing violations of Illinois gambling laws. We hold therefore that the judge erred in suppressing those conversations.

The cases cited by the Kahns do not aid them. The point here was not raised in *Wolf v. United States,* 291 U.S. 7 (1934), and there was no evidence in that case of dual participation in crime. In *Blau v. United States,* 340 U.S. 332 (1951), the husband refused to disclose the whereabouts of his wife, sought as a grand jury witness, who secretly entrusted her address to him. The privileged communication was not in furtherance of a crime. The decision in *Ivey v. United States,* 344 F.2d 770 (5th Cir. 1965), is also distinguishable, since the objectionable testimony of Mrs. Ivey did not deal with the furtherance of a crime, but was an admission of a past crime. In *Peek v. United States,* 321 F.2d 934 (9th Cir. 1963), the court found no abuse of discretion in the trial court's denying a pre-trial motion for severance which urged

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[13] It is noteworthy also that the attorney-client privilege may not be invoked where commission of a crime is involved. See *United States* v. *Hoffa,* 349 F.2d 20, 37 (6th Cir. 1965), *aff'd* 385 U.S. 293 (1966).

[14] 77 HARV. L. REV. at 734.

the possibility that the government would use statements in violation of the marital privilege—the district court had deferred ruling to the actuality of the trial. In the case before us the judge used his discretion to rule before trial. No claim is made that the ruling was an abuse of discretion.

II

In the motion to suppress the Kahns alleged that the affidavit supporting the eavesdrop order "nowhere states facts" showing probable use of the Kahn telephones for illegal purposes by "others as yet unknown;" that the government "knew, or should have known," the occupants of the Kahn home and made no request for permission to intercept conversations other than those of Irving Kahn; and that the conversations of Minnie Kahn were "recklessly and illegally" intercepted. The government's answer to the motion asserted that Minnie Kahn fell into the class of "others as yet unknown." The judge suppressed the conversations.

The vital issue is whether Minnie Kahn can properly be included in the class of "others as yet unknown." The judge, in granting the motion, had before him the government's failure to deny that it knew Minnie Kahn was an occupant of the Kahn home and accordingly would use the home phones. We agree with the judge's finding and we hold that the wiretap order did not authorize interception of Minnie Kahn's conversations as she was neither identified in the order nor was she within the class of "others as yet unknown."

Section 2518(1)(b)(iv) of the Act requires the government to identify, in an application, any person, "if known," whose communications are to be intercepted. The implication is that if not known, such a

person's conversations may be intercepted if that person's probable complicity in the offenses being committed is not yet known. The wiretap order was limited to conversations of "Irving Kahn and others as yet unknown." Thus in order to satisfy the limitations of the judge's order the wiretap had to meet two requirements: 1) that Irving Kahn be a party to the conversations, and 2) that his conversations intercepted be with "others as yet unknown."

The issue before us rests upon the scope of the term "others as yet unknown." A narrow construction of the term would limit the meaning of "others as yet unknown" literally to persons whom the government did not know. Under this construction Minnie Kahn would be excluded from the reach of the interception order, since she was admittedly known to the government as Irving's wife. A second construction would confine the term "others as yet unknown" to *those persons whom the government did not know were engaging in illegal conversations with Irving Kahn.* The first construction of "unknown" refers to the *identity* of the person; the second construction refers to the *illegal activities* of the person. Under the second construction, even if the government knew a person it might still not "know" of that person's probable illegal activities. If Minnie Kahn, although known to the government, was not known to be a likely user of the Kahn telephones for illegal activities, she would be "unknown" under the second construction.

No facts were stated in the application and affidavit in support of the authority to wiretap the conversations of "others as yet unknown." The government argues that that is unimportant and that it is enough that the order permits interception of conversations concerning crime to be continued until the manner of

Irving Kahn's participation and that of his confederates in the crime be revealed and until the confederates are identified and the place of operation and the nature of the conspiracy are revealed. It contends that the order need not require Irving Kahn's confederates be in conversations only with him and that all conversations about gambling on the subject phones may be intercepted.

Congress, in order to "safeguard the privacy of innocent persons," found that interception should be disallowed where none of the parties had consented to the wiretap and where it is not authorized by a proper court order.[15] It stated that the purpose of Title III was two-fold: protection of personal privacy, and "delineating on a uniform basis" the circumstances and conditions under which wiretapping may be authorized.[16] We think that it is necessary therefore to limit the class of "others as yet unknown" as tightly, in the interest of personal privacy, as the competing need for reasonable public protection in law enforcement permits. In our opinion Congress did not intend that the implication in the term "if known" should be extended to embrace persons whom careful investigation by the government would disclose were probably using the Kahn telephones in conversations for illegal activities. We conclude that in the interest of protecting personal privacy a broader construction of the term "others as yet unknown" is required, *i.e.*, if the government did not know but should have known by prudent investigation of the

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[15] Omnibus Crime Control and Safe Streets Act of 1968, § 801(b), Title III, 82 Stat. 197; S. Rep. No. 1097, 90th Cong., 2nd Sess., U.S. Code Cong. & Ad. News 2112, 2153.

[16] Omnibus Crime Control and Safe Streets Act of 1968, § 801(d), Title III, 82 Stat. 197.

likelihood of Minnie Kahn's use of the telephones for illicit activities, she was not a person "unknown."

It is not in the public interest to relax concern of individual privacy to accommodate less than careful performance on the part of government agents. It is far more important, in our opinion, to protect Minnie Kahn's personal privacy than it is to permit the government to avail itself of fruits of its less than careful intrusion upon her privacy in order to prosecute her for the offense.[17]

The application of the Assistant Attorney General merely sought authority to wiretap the conversations of "others as yet unknown" on the basis of the agent's affidavit. The affidavit did no more than indicate that the wiretap of conversations of "others as yet unknown" would be useful. The agent's affidavit contains long lists taken from telephone company records of interstate telephone calls using the Kahn phones to discuss gambling. The sources which led to these lists were gamblers who had worked with or engaged in gambling enterprises with Irving Kahn. It is highly improbable that all of these communications were with Irving Kahn. The sources which led to these lists would also seem likely sources from which questioning would elicit information identifying members of the Kahn household other than Irving Kahn who used the telephones in aid of the unlawful enterprise. And if the attempt to elicit that information was unsuccessful, we fail to see why the agent could not state the reason for lack of success, and the interception

[17] "What is truly central to the fourth amendment, as Justice Bradley stated in his historic opinion in *Boyd v. United States* [116 U.S. 616 (1886)] is 'the sanctity of a man's home and the privacies of life.'" *Spitzer, Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. OF PA. L. REV. 169, 180 (1969).

order find that "normal" investigative procedures have been tried and have failed.[18] The conclusionary statement in the application and affidavit that "'normal investigative methods reasonably appear to be unlikely to succeed and are too dangerous to be used" is too slender a reed upon which to rest the invasion of Minnie Kahn's privacy. And the government was precluded from augmenting the application and affidavit at a suppression hearing. *United States v. Roth*, 391 F. 2d 507, 509 (7th Cir. 1967).

We think the government's wiretap impinged upon Minnie Kahn's privacy and accordingly the government had the burden, at the suppression hearing, of justification. We find no justification in the record for not determining from the informants used for the government's application and affidavit whether Minnie Kahn had received or sent, through the particular telephone numbers, communications with respect to unlawful gambling activities; and the government has not shown that had it conducted its investigation with the care Congress intended to protect personal privacy, it would not have discovered whether or not Minnie Kahn had implicated herself by her conversations. Where, as here, the government's application and affidavit disclosed sources from which it could probably have learned the likelihood that Minnie Kahn was using the Kahn phones in illicit activity, but neither made the attempt, nor stated facts justifying not attempting, to gain that knowledge, the subsequent wiretaps amounted to a virtual general warrant in violation of her Fourth Amendment right.[19] We conclude that the application and affidavit do not

[18] 18 U.S.C. § 2518(3)(c): "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;"

[19] *Spitzer*, *supra* n. 17, at 191.

support an interpretation of the interception order to include Minnie Kahn in the class of "others as yet unknown" and that the district judge did not err in deciding that the order did not authorize the wiretapping of her telephone conversations.

It might be questioned whether conversations of Minnie Kahn could be lawfully seized had the government after proper investigation determined that no other persons in the household—other than Irving Kahn—had used the phones in committing crimes, and intercepted Irving Kahn's conversations only to find Minnie Kahn discussing with him an illegal enterprise. The suppositious question presupposes no prior knowledge of any unlawful activity by Minnie Kahn and no basis on which to include her in the application and affidavit class of "others as yet unknown" who had in the past used or were presently using the phones for conversations regarding the offense. The question is not relevant to the question before us. However, we think the evidence seized in such an event might be used in the prosecution of Irving Kahn, but not against Minnie Kahn. There is a distinction between the event supposed in this question and the question arising where, for example, a valid tap on a named person concerning a particular offense uncovers evidence against another person of a different offense. *United States v. Cox,* 449 F.2d 679 (10th Cir. 1971).

The government relies upon language in *Berger v. New York,* 388 U.S. 41, 55 (1967). *Berger* is of no aid to the government in view of our conclusion that the government has not shown why it could not have identified Minnie Kahn in its application and affidavit. Neither does *United States v. Cox, supra,* aid the government. There the order specified narcotics violation, and conversations about bank robbery were moni-

tored. The court found no constitutional error in the use of the conversations at the bank robbery trial.

Furthermore, the government analogizes the Kahn situation to the discussion in *Alderman v. United States,* 394 U.S. 165, 177 n.10 (1969), where the Court approved seizure and use of narcotics in a proper warrant specifying gambling material. There the narcotics were contraband. In *United States v. Sklaroff,* 323 F. Supp. 296, 325 (S.D. Fla. 1971), a district judge decided that "if a lawful court order . . . [as to a] named person[s] is issued, and . . . conversations [of] . . . other persons not named . . . are *lawfully* intercepted" (emphasis added), the seized conversations may be used. This decision was followed in *United States v. Perillo,* 333 F. Supp. 914, 919–921 (D. Del. 1971). The word "lawful" in the language quoted begs the question before us.

The judgment is reversed in so far as it is based upon the marital privilege ground, and is affirmed in so far as it decided that the wiretap order did not authorize the interception of Minnie Kahn's conversations.

KNOCH, *Senior Circuit Judge* concurring in part and dissenting in part. I am in complete accord with Judge Kiley's well reasoned views concerning the interception of Minnie Kahn's telephone conversations with others than Irving Kahn, but I must respectfully dissent from his conclusion that the marital privilege does not apply to their conversations with each other. As counsel for the Kahns argued persuasively before this Court, an attorney-client relationship may be effectively destroyed once the two become fellow criminals, but husband and wife remain husband and wife even though they embark on

a joint criminal venture. I would affirm the decision of the District Judge.

STEVENS, *Circuit Judge*, concurring in part and dissenting in part. The government's appeal from Judge McMillen's suppression order requires us to construe (a) an earlier order entered by Judge Campbell authorizing the telephone intercepts and (b) the statutory requirement that such an order specify the identity of the persons, "if known," whose conversations are to be intercepted. I agree with Judge Kiley that conversations between Minnie and her husband in aid of their criminal enterprise were not privileged. I believe, however, that Judge Campbell's order of March 20, 1970, authorized the agents to listen to conversations in which Irving did not participate, and that the failure to name Minnie in the order is not an appropriate ground for suppressing her conversations.

A. THE ORDER

On March 20, 1970, the government applied to Judge Campbell for an order authorizing the interception of conversations using two telephones identified by number and by location in Irving Kahn's residence. One purpose of the request was to intercept communications which would reveal the identity of Irving Kahn's confederates.[1]

The request was supported by a detailed 18-page affidavit summarizing the results of a thorough investigation leading to the conclusion that Irving Kahn's two telephones were being used in an illegal gambling enterprise, and that Irving Kahn was a principal in the venture. Based on that showing, Judge Campbell found probable cause to believe that Irving Kahn "and others as yet unknown" have committed and are committing the specified offenses, and that the

[1] Affidavit of Douglas P. Roller, p. 4.

two designated telephones "have been and are being used by Irving Kahn and others as yet unknown in connection with the commission of the above described offenses." It should be noted that he did not find merely that the telephone numbers were being used illegally, but rather that the two telephones in Irving's residence were being so used by "others as yet unknown" as well as by Irving. Although the record support for Judge Campbell's findings has been suppressed, it was available to Judge McMillen, who entered the suppression order, as well as to this court. No judge who has reviewed that record has expressed any doubt that Judge Campbell's findings were fully supported by the record.

Having made the findings required by the statute, Judge Campbell authorized the interception of communications over Irving Kahn's two telephones. The scope of the authorization granted by Judge Campbell's order was to "intercept wire communications of Irving Kahn and others as yet unknown concerning the above-described offenses to and from two telephones, subscribed to by Irving Kahn, both located at 9126 Four Winds Way, Skokie, Illinois, a private residence, and carrying telephone numbers 675-9125 and 675-9126, respectively."

If we consider the language used by Judge Campbell in his findings and in his order, it is clear that the intercept authority was not limited to conversations to which Irving Kahn was a party. If that had been Judge Campbell's purpose, there would have been no need to refer to the illegal use of the two telephones in Kahn's residence, not only by Kahn himself, but also by "others as yet unknown." The authorization in the order does not describe communications *between* Irving Kahn and others; rather it describes

"conversations *of* Irving Kahn and others as yet unknown" using the two telephones in his residence. If only the conversations of Irving were involved, the findings and the order are replete with redundancies.

My reading of the statement of purpose in the government's application, Judge Campbell's findings, and the language of the order itself does not permit me to accept an interpretation which limits the scope of the intercept authority to conversations to which Irving Kahn was a party.

B. THE STATUTE

There are two separate reasons why I believe the majority misreads the statute: (1) in my opinion the record does not support the conclusion that Minnie Kahn's participation in the gambling enterprise was "known" to the government on March 20, 1970, within the meaning of § 2518(4)(a); and (2) the adequacy of the government's investigation prior to March 20, 1970, is not relevant to the "if known" issue arising under § 2518(4)(a), but rather pertains to a question which was resolved by a finding of fact entered in compliance with § 2518(3)(c).

1. *Section 2518(4)(a)*

This section provides:

> "(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> "(a) the identity of the person, if known, whose communications are to be intercepted; . . ." 82 Stat. 219, 18 U.S.C. § 2518(4)(a).

Just as a search warrant must carefully limit the discretion of the officer executing the warrant by defining the scope of his authority to search and the objects to be seized, this subsection was intended to

require the order to define the scope of the agent's authority to intercept conversations.[2] The inclusion of the words "if known" indicates that Congress intended to permit the interception of some conversations of persons whose participation in the criminal activity was unknown at the time the order was entered. As I read the record, Minnie Kahn was such a person on March 20, 1970.

The court does not hold that the record supports the conclusion that Minnie Kahn was a person who was actually "known" to be participating in the conversations sought to be seized. On the contrary, the court treats the statutory words "if known" as if Congress had used language broad enough "to embrace persons whom careful investigation by the government would disclose were probably using the Kahn telephones in conversations for illegal activities." In my opinion we should adhere to the language which Congress actually used rather than adopt what we might consider to be a more desirable requirement.

The extent of the government's knowledge should, I believe, be appraised as of the time it requested an intercept order. Just as evidence obtained by means of a search may not be used retroactively to establish probable cause for the issuance of a warrant defective on its face, it seems equally clear that our present knowledge of Minnie Kahn's guilt may not be imputed to the agents who had not yet intercepted her conversations. If we put the seized evidence to one side, there is nothing in the record to support an inference that the government should have known

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[2] At least that is a fair inference to be drawn from the language of the section and the explanatory reference in the Senate Committee Report to *West* v. *Cavell*, 158 U.S. 78, see especially 87–88; U.S. Code Cong. & Ad. News, 90th Cong., 2d Sess. 2191 (1968).

that Minnie Kahn, instead of Pamela Kahn, Howard Kahn, or possibly some regular visitor, would use Irving's telephones to transmit gambling information to a third party while he was out of town.

As Judge Kiley points out, it is entirely possible that one of the anonymous informants referred to in the affidavit supporting the government's application for intercept authority might have known that Minnie made illegal telephone calls and might have given that information to a government investigator; on the other hand, it is also possible that she made such calls only on rare occasions when Irving was out of town, or that informants willing to describe Irving might not have been willing to mention Minnie. The whole inquiry, in my opinion, is a matter of speculation and is neither necessary nor appropriate to the determination of whether the order meets the "if known" requirement of § 2518(4)(a).

2. *Section 2518(3)(c)*

The statute authorizes the judges to enter an intercept order if he makes certain determinations on the basis of the government's factual showing. Among others, he must determine that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 82 Stat. 219, 18 U.S.C. § 2518(3)(c).

Judge Campbell made an express finding of fact complying with this requirement. The finding is supported by a detailed description of the "normal investigative procedures" which had been used, and by a perfectly reasonable explanation of why "the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to

prove violations of these statutes."[3] Although the results of the investigation plainly indicated that Irving Kahn's telephones were being used in connection with the commission of an offense, the record also supports the conclusion that it was unlikely that admissible evidence would be available to prove Kahn's guilt unless intercept authority was obtained. Nothing in the record suggests that a further investigation which might have ascertained Minnie's participation would have obviated the need for such authority. In short, the finding required by § 2518(3)(c) was made and, in my opinion, is supported by the record.

Although § 2518(3)(c) imposes a duty on the government to exhaust normal investigative procedures before applying for an intercept order, it seems unlikely that the "if known" requirement in § 2518(4)(a) was intended to impose either an additional exhaustion requirement or a more severe standard for measuring the government's compliance with the express language of subsection (3)(c). I am therefore persuaded that the majority's interpretation of the "if known" requirement will merely tend to confuse two quite different statutory purposes.

In sum, in my opinion the court's decision is predicated on an improper reading of Judge Campbell's order of March 20, 1970, and an incorrect interpretation of the statute. In view of the majority's disposition of the case, comment on constitutional issues is inappropriate.

A true copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[3] Affidavit of Ray I. Shryock, p. 16.

APPENDIX B

United States Court of Appeals for the Seventh Circuit

January 29, 1973

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, No. 71-1931 *vs.* IRVING KAHN and MINNIE KAHN, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (*71 CR 174*)

Before Hon. WIN G. KNOCH, Sr. Circuit Judge, Hon. ROGER J. KILEY, Sr. Circuit Judge, Hon. JOHN PAUL STEVENS, Circuit Judge.

On consideration of the petitions for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petitions for a rehearing in the above-entitled cause be and the same are hereby denied.

APPENDIX C

UNITED STATES DISTRICT COURT

(Caption—Docket No. 71 CR 174)

ORDER

This cause comes on to be heard on the defendant's motions to suppress the results of electronic surveillance and the court having considered said motions, the prior order of this court and affidavit on which it was based, together with the authorities cited by the parties, and being fully advised in the premises.

It Is Hereby Ordered, Adjudged And Decreed that

1. The affidavit of Ray I. Shryock, special agent, upon which the electronic interceptions was based, satisfied the requirements of 18 U.S.C. § 2518(1) for a showing of probable cause, and the application of the United States of America in case #70 C 673 was adequately supported by the affidavit.

2. The Order Authorizing Interception of Wire Communications entered on March 20, 1970, by Judge Campbell of this court in case #70 C 673 on the basis of said application is valid and enforceable. 18 U.S.C. § 2518 (3)–(5). The Order Authorizing Use of a Pen Register entered in said case on the same day was equally well founded, inasmuch as it was based on the same affidavit and showing as was the order authorizing interception of conversations. The two orders are *sui generis* and must be read together.

3. The use of the toll call records of the telephone companies, as revealed in the Shryock affidavits, is no grounds for setting aside the order or suppressing its

fruits. *United States* v. *Covello*, 410 F.2d 536 (C.A. 2, 1969), *cert. den.*, 396 U.S. 879 (1969).

4. The order authorizing the interception, and the statute under which it was entered, is limited in this case to conversations participated in by the defendant Irving Kahn with persons unknown at the time the authorizing order was entered. If so limited, there is no doubt of the constitutionality of the statute or of the violation of any constitutional right of that defendant.

5. Any conversations exclusively between the defendant Irving Kahn and his wife Minnie Kahn are privileged communications and are hereby suppressed. 18 U.S.C. § 2517(4).

6. The motion of the defendant Minnie Kahn to suppress her intercepted conversations is granted, as they were not authorized by Judge Campbell's order in 70 C 673.

7. The motion of the defendant Irving Kahn to suppress intercepted conversations to or from his home is also granted to the extent that he did not personally participate in such conversations. *Alderman* v. *U.S.*, 394 U.S. 165, 176 (1969).

8. This case is set for a status report on November 8, 1971 at 10 a.m. without further notice.

Enter:

THOMAS R. MCMILLEN,
Judge, U.S. District Court.

NOVEMBER 2, 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1972

NO. 72-1328

In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA,

Petitioner,

vs.

IRVING KAHN and MINNIE KAHN,

Respondents.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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AUTHORITIES CITED

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

It is our submission hereinafter that Petitioner urges a statutory construction of Title 18, U.S.C. §2518(4)(a) in a manner contrary to its plain meaning and intendment.

On another Petition for a Writ of Certiorari arising out of the same case in the courts below and now pending in this Court under No. 72-1194, these Respondents (there, Petitioners) requested this Court to issue its Writ to review a divided opinion of the United States Court of Appeals for the Seventh Circuit reversing the United States

District Court, which found that the "marital privilege" applied under Title 18 U.S.C. §2517(4), and suppressed a communication between these Respondents, husband and wife.

The Government introduces its urging here for the grant of Certiorari on two separate grounds. It encourages this Court that the decision in this case is in conflict with decisions in other circuits. This urging it has elaborated on under Point 3 of its petition. We have also, hereinafter, discussed the government's cases—and other authority—under Point 3 to demonstrate no conflict.

The other urging of the government is that the decision of the Court of Appeals for the Seventh Circuit constitutes a construction of "an important new statute in a manner inconsistent with the language and intent of Congress . . . [which] . . . [i]f allowed to stand, . . . would severely undercut the effectiveness of court-authorized wiretapping, and thwart the congressional intent in permitting the use of this important law enforcement tool." (pp. 7-8, Petition) The government expansion on this urging is singular in that nowhere is presented the intent of the Congress, and the statutory words are submitted only to argue sublime subtleties neither implicit nor explicit in their clear context.

We agree with the government that wiretapping is an "important law enforcement tool." Probably the most important and intrusive that the Congress has ever authorized. Fully cognizant of its Constitutional implications, stringent limitations were attached to it, to narrowly avoid Constitutional conflict. All of those limitations were clearly designed for and addressed to the preservation of privacy.

In that recognition—which we will presume the government to concede—the limitations must be read narrowly, instead of the expansive, laissez-faire attitude we encounter on this Petition.

Recognizing, as we do, that the government never expands its initial urging that the Seventh Circuit decision conflicts with the language and intent of Congress, we hereinafter will respond to its first two points for what they appear to stress as reasons for granting the Writ.

1. (a) Initially, the government argues that wiretapping generally concerns "three classes of persons involved." The second generalization[1] is one that has no basis in any case of which we are informed, and becomes a "generalization" on the basis of this case alone.

But by the generalization the government attempts to "lump" the second "class" with the third class, to-wit: conversations of the named target with third persons. Of the third class, authorities abound. But the inter-identity of the second and third classes are neither self-apparent, nor does the government provide any rational inter-identification. Nor does the government explain how the third class sanctioning conversations between the named, identified person with "persons unknown" translates into unnamed-unidentified persons conversing with "persons unknown." We do not tarry with futile rationalizations on this enigma, but will proceed to the second submission of the government under Point 1.

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[1] "Other known users of the target telephones, such as family members or other frequenters of the premises, about whom there is no probable cause to suspect complicity in criminal activity." (p. 8, Petition)

(b) Here the government submits that since the application under section 2518(1)(b)(iv) requires "the identity of the person, if known, *committing the offense* and whose communications are to be intercepted"—then 2518(4)(a) which requires specification in the interception order of "the identity of the person, if known, whose communications are to be intercepted" means such identification *only* if it is known that he or she is committing the offense. If, the government reasoning continues, it is not known whether he or she is committing the offense, he or she need not be named. In other words, the application for the Order is more restrictive than the Order; the Order in application is broader in enforcement than the application therefor. Stated baldly, the reasoning of the government is unconscionable. The government, then, likens the requirements for a search warrant to the interception authorization. We have never found a case where a search warrant is broader than the request, complaint or petition therefor.

(c) Under this sub-submission, the government seeks to identify the warrant to search premises with the authority to intercept communications, employing in part the "plain view" doctrine. It would seem their relied upon case (*United States* v. *Cox*, 10 Cir., 449 F. 2d 679), answers this question:

> "* * * This is, of course, an exception to the requirement that an object seized must be particularly described in the application for a warrant. Inasmuch as warrants for interception of electronic information generally follow the priciples applicable to search warrants, it is said that just as evidence not described but which is discovered by the officers in the course of a valid search is under certain circumstances admissible, so also intercepted conversations should be similarly treated.

"One difficulty in this is that the law on this plain view subject is not fully developed and also remains unclear. For example, in Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927), it was held that a search warrant must be executed strictly in accordance with its terms, leaving nothing to the discretion of the officer. It is argued that Harris v. United States, 331 U.S. 145, 155, 67 S.Ct. 1098, 91 L.Ed. 1399 (1945), modifies the *Marron* doctrine and that lower federal courts have considered *Harris* fully applicable to search warrant cases even though it had to do with seizure incident to arrest.

"Discussion in Coolidge v. New Hampshire recently decided, June 21, 1971, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, succeeds in clarifying the 'plain view' doctrine. But the analogy is imperfect because the search for property is a different and less traumatic invasion than is the quest for private conversations." 449 F.2d 679, 686.

The government argument then continues that, while under a search warrant you must describe with particularity the premises to be searched and the articles to be seized, it is not essential that the owner of the premises be named. Therefore, argues the government, since the Congress did not *specifically* articulate that such identity is required in telephonic interception, non-identification is permitted. In answer to that submission, we submit that the Congress did so articulate in 2518(4)(a).[2]

It also overlooks the necessary requirement of a search warrant that it state "reason to believe" that the article(s) searched for will be found on the premises. *Aguilar* v.

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[2] Even the Government cases regarding search warrants (*Hanger* v. *United States*, 8 Cir., 398 F. 2d 91 and *Dixon* v. *United States*, 5 Cir., 211 F. 2d 547), consider the naming of the owner or occupant of the premises "desirable".

Texas, 378 U.S. 108, 113. Such necessary requirement is no less basic where conversations are sought to be seized. No such showing was attempted here. There was here no statement of reasonable cause to believe that illegal conversations of Minnie Kahn would be obtained by interception.

2. This point calls on no authority for support save the dissent in the Court below, which, in turn, is equally without support in authority. Let us state the proposition differently. The government knows 4 occupants of a household. Two are teen-agers, the third a house-wife, and the fourth a suspect of illegal activities. The government's argument is that the authority to intercept number four connotes an authority to intrude upon the privacy of the other three. The abuses implicit in such a suggestion, the Constitutional implications, are patent, and are fully discussed under Points 1 and 3.

But the factual dissembling here is intolerable. It argues, as though a speculation, that Minnie Kahn *could* have been known as a member of the household. It was alleged that she *was* so known and the allegation was never put in issue. It argues that her use of the telephones on the premises *could* have been anticipated. It is ridiculous to suggest that such use by her—and her children—was not anticipated.

And if—as the government in its obtuse argument suggests—her involvement in the gambling enterprise could only be known by interception—there was no reasonable grounds for the intrusion, and the Fourth Amendment forbids it, as well does section 2518(4)(a).

3. The Government misinterprets the identity requirement of Title 18, United States Code, §2518(4)(a). That reads in pertinent part:

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known whose communications are to be intercepted; . . . ."

The legislative history reemphasizes the requirements of sub-paragraph (a):

"Subparagraph (a) requires the order to specify the identity, if known, of the individual whose communications are to be intercepted." *U.S. Code Congressional and Administrative News,* 90th Congress, 2nd Session, 1968, Vol. 2, page 2191.

The Government asks this Court to accept an interpretation of this language, which we submit is eminently clear, into something which the Congress clearly did not intend. Under that facile reconstruction, the statute would read:

"(a) . . . the identity of the person, if known [to be a lawbreaker], whose communications are to be intercepted; . . ." (Bracketed portions reflect the government's interpretation.)

It is clear this changes the sense of the statute, and is clearly amendatory. But reconstruction of legislative history above, cannot be changed so cavalierly. "[T]he identity, if known, of the individual whose communications are to be intercepted" does not admit a construction of an added requirement of identity of the known person's occupation. Minnie Kahn's identification as a person was known, and so the Courts below recognized.

"The judge, in granting the motion, had before him the government's failure to deny that it knew Minnie Kahn was an occupant of the Kahn home and accordingly would use the home phones. We agree with the judge's finding and we hold that the wiretap order did

> not authorize interception of Minnie Kahn's conversations as she was neither identified in the order nor was she within the class of 'others as yet unknown.' " (Petitioner's Brief, App. 8a)

The contention of the Government now that "if known" so qualified the first requirement under the statute as to make it a nullity is an intolerable "analysis". The government interpretation is that Judge Campbell, who entered the intercept order, knowing the identity of four persons who were members of the household on Four Winds Way were using the telephone; that, though known, there was no reasonable reason to believe that they (Minnie Kahn, Pamela Kahn, and Howard Kahn) were using the phone for illegal purposes; that the order authorized intrusion on their conversations, not because their identities were unknown, but because it was not known whether they might not be using the phone in violation of law. It is inconceivable to us that such a reasoning can be attributed to Judge Campbell in issuing the order.

Further, the requirements of (a) were, according to the legislative history, included to satisfy the message conveyed in *West* v. *Cabell*, 153 U.S. 78, which stands for the proposition that the private intention of the magistrate is not a sufficient substitute for the constitutional requirement of a particular description in the warrant. 153 U.S. at 87.

Known, as it was, the members of the household, and the inescapable conclusion that the phone is available to all members for their use, it is inconceivable that the intent of the order was that that phone should be monitored when only the other members of the household were on the premises, as happened here. We refuse to believe that Judge Campbell would have issued an order authorizing the

interception of the telephone calls of Irving Kahn "and, when he is absent from the premises, the telephone calls of any other member of the household."

The Government argument that under the statute parties violating laws do not have to be specified if they are not known, and, therefore, the statute, *sub silentio,* authorizes omission of identity of known persons if it is unknown whether they are violating laws, is syllogistic nonsense.

The Government also submits to this Court that Certiorari should be granted for the reason that the decision here conflicts with that of the Second Circuit in *United States* v. *Fiorella,* 468 F. 2d 688. We submit it does not so conflict.

In *Fiorella,* the Court expressed the issue that the authorization of interception of six named persons "and *others yet unknown*" did not, because of the addition of the italicized words, convert the authorization into a general warrant, and continued:

> "The statute, 18 U.S.C. §2518(4)(a), however, only requires that the order specify 'the identity of the person, if known, whose communications are to be intercepted.' " 468 F.2d 688, 691.

This is exactly the holding of the Seventh Circuit:

> "Where, as here, the government's application and affidavit disclosed sources from which it could probably have learned the likelihood that Minnie Kahn was using the Kahn phones in illicit activity, but neither made the attempt, nor stated facts justifying not attempting, to gain that knowledge, the subsequent wiretaps amounted to a virtual general warrant in violation of her Fourth Amendment right." (Pg. 12A Government Petition)

The issues in the cases are inapposite, and do not become conflicting because of the extra-contextual quoting of similar words used.

The Government also urges as a reason for granting the Writ that the decision conflicts with the reasoning of two cases known as *United States* v. *Cox,* the earlier from the Tenth Circuit, 449 F.2d 679, the latter from the Eighth Circuit, 462 F. 2d 934. The earlier case was clearly distinguished by the Seventh Circuit in its decision.

> "It might be questioned whether conversations of Minnie Kahn could be lawfully seized had the government after proper investigation determined that no other persons in the household—other than Irving Kahn—had used the phones in committing crimes, and intercepted Irving Kahn's conversations only to find Minnie Kahn discussing with him an illegal enterprise. The suppositious question presupposes no prior knowledge of any unlawful activity by Minnie Kahn and no basis on which to include her in the application and affidavit class of 'others as yet unknown' who had in the past used or were presently using the phones for conversations regarding the offense. The question is not relevant to the question before us. However, we think the evidence seized in such an event might be used in the prosecution of Irving Kahn, but not against Minnie Kahn. There is a distinction between the event supposed in this question and the question arising where, for example, a valid tap on a named person concerning a particular offense uncovers evidence against another person of a different offense. United States v. Cox, 449 F.2d 679 (10th Cir. 1971).
>
> • • •
>
> "Neither does United States v. Cox, supra, aid the government. There the order specified narcotics violation, and conversations about bank robbery were monitored. The court found no constitutional error in the use of the conversations at the bank robbery trial." (Pg. App. 13a § 14a Government's Petition)

Further in that case there was authority to intercept wire communications to and from a *telephone number* listed in the name of Leonard E. Richardson without identifying the person, if any was known, whose conversations were to be monitored. On a subsequent trial, a phone conversation was introduced to which Leonard E. Richardson was not a party. The Government suggests this is an authority for listening in to the phone conversations of Minnie Kahn. There was in that case no inquiry into the question of whether 18 U.S.C. §2514(4)(a) was satisfied, and therefore we, like the Court of Appeals, "are at liberty to presume that all of the proceedings followed were in accordance with the statute since the defendant did not find fault with any of these occurrences." 449 F. 2d at 681. This case is no authority for the government position.

In the latter *Cox* case, the issue concerned the failure to minimize interception. That case was defined by the Court as "an organized criminal conspiracy" (462 F. 2d at 1300). The Court tacitly admitted some intercepted conversations went beyond the realm of relevancy, but concluded that the farflung nature of the investigation warranted the excesses, and referred to the legislative history:

> "Accordingly, we turn to the Act's provisions and history which, when read together, indicate that the minimization requirement of 18 U.S.C. § 2518(5) is nothing more than a command to limit surveillance as much as possible in the circumstances, *i. e.*, the minimization question must be considered on a 'case-by-case basis. . . .' Senate Report No. 1097, 1968 U.S. Code Cong. & Adm. News, at 2190.
>
> "[4] In making this case-by-case inquiry, we also must be mindful that the statute's framers recognized that interceptions which might be excessive in some circumstances might be appropriate in others." 462 F.2d 1293 at 1300.

We invite more appropriately the Court's attention to *United States* v. *Vega*, E.D.N.Y., 52 F.R.D. 503, 506-7.

> "It appears to this court that the supporting affidavit demonstrated the right to seize telephone conversations between the defendant Vega and any third party which related to the possession, sale, distribution or concealment of narcotics. No showing is made for the seizure of the conversations of Barbara Titus, in whose name the telephone stood. Absent proof that the defendant Vega used the telephone in his narcotics business, the wiretap order could not have issued. Yet the subject order permits the seizing of all telephonic communications over telephone number 654-0186.
>
> "The court finds the order too broad and lacking in the particularity required by both the state and federal statutes."

We suggest to the Court that this case is very similar in import to this Court's reasoning in *Katz* v. *United States*, 389 U.S. 347. Admittedly in *Katz* the reversal was not because there was not reasonable grounds that the interception of Katz's calls would have been authorized had a proper authority been appealed to, but rather because the interception of his calls was without authority. But it is inconceivable that the other persons using that public booth could have been eavesdropped upon had an order been applied for. As this Court noted in the *Katz* case "the agents confined their surveillance to the brief periods during which he [Katz] used the telephone booth, and *they took great care to overhear only the conversations of the petitioner himself.*" 389 U.S. at 354. (Our emphasis)

As this Court noted in that case, and as should be reemphasized, the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures. 389 U.S. 353.

Therefore, irrespective of the action this Court takes in connection with the pending Petition by these Respondents for the review of other questions in this case, the instant Petition for a Writ of Certorari should be denied.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
ANNA R. LAVIN,
Attorneys for Respondents.

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1328

UNITED STATES OF AMERICA,

Petitioner

—v.—

IRVING KAHN and MINNIE KAHN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 30, 1973
CERTIORARI GRANTED MAY 14, 1973

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1328

UNITED STATES OF AMERICA,

Petitioner

—v.—

IRVING KAHN and MINNIE KAHN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

DOCKET ENTRIES

2/24/71	Filed Indictment
2/24/71	Filed Designation
2/24/71	Order Indictment returned in open Court, bench warrant to issue as to both defendants, set bond at $4,500.00 to each defendant—Robson J
2/24/71	Issued Bench warrant and copies of Indictment to Marshal's office
3/ 3/71	Defendants appears with counsel and acknowledges receipt of the indictment and waives reading of same, defendants given twenty days to file all motions. Defendants enter pleas of not guilty. Government is given five days to answer. Order cause continued to April 7 1971 at 10 AM for decision. Appearance of the defendants is waived at that time—Lynch J notices mailed 3-3-71
3/16/71	Filed warrant for arrest returned executed
3/31/71	Filed stipulation
3/30/71	Enter order granting stipulation to extend time to file pre-trial motions to and including May 1, 1971—Lynch J notices mailed 4-5-71
4/27/71	Filed motion to suppress
4/27/71	Filed motion to dismiss the indictment
4/30/71	Enter order granting government's motion for extension of time to file answer to pre-trial motion until May 10, 1971—Lynch, J. Mailed notices 5-5-71
4/30/71	Enter order granting government's motion for extension of time to file answer to pre-trial motion until May 10, 1971—Lynch, J. Mailed notices 5-5-71
5/11/71	Filed Government's Answer to defendants motion to dismiss indictment

5/11/71 Filed Government's Answer to defendants motion to suppress

5/21/71 It is ordered that this cause is set for a status report on May 26, 1971 at 2 PM—Mc Millen, J
notices mailed 5-24-71

5/21/71 Order this cause to be reassigned to Judge Mc Millen, Executive Committee

5/26/71 Defendant given until June 9 1971 in which to reply to governments answer to defendants motions to dismiss indictment and defendants motion to suppress motions are taken under advisement—McMillen, J
notices mailed 6-2-71

6/17/71 Enter order allowing motion for leave to file defendants reply to answer of Government to motion to suppress instanter—McMillen
notices mailed 6-21-71

10/22/71 On the joint and several motions of the defendants to dismiss the indictment. It is hereby ordered that defendants' motions are denied—Draft—McMillen, J.
Mailed notices 10-26-71

11/ 2/71 Motion of the defendants to suppress the results of electronic surveillance granted. Case set for a status report on November 8, 1971 at 10 AM —Mc Millen, J
notices mailed 11-8-71

11/ 8/71 Cause is continued for a status report to November 15, 1971 at 10 AM—Mc Millen, J
notices mailed 11-10-71

11/15/71 Cause is continued for further status report to January 3, 1972 at 10 AM—McMillen, J
notices mailed 11-17-71

11/19/71 Filed Notice of Appeal, by the U.S. Government, from the order of the November 2, 1971

11/22/71 Certified and transmitted Notice of Appeal to the U.S.C. Appeals

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

70C 673

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

APPLICATION

DOUGLAS P. ROLLER, an attorney of the United States Department of Justice, being duly sworn states:

This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, Department of Justice, Washington, D. C., together with agents of the Federal Bureau of Investigation.

1. He is an "investigative or law enforcement officer —of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

3. This application seeks authorization to intercept wire communications of Irving Kahn, Jake Jacobs and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is,

offenses involving the use of interstate telephone communication facilities for the transmission of bets and betting information and in aid of a racketeering enterprise (gambling), in violation, respectively, of Sections 1084 and 1952 of Title 18, United States Code, and a conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code, which have been committed and are being committed by Irving Kahn, Jake Jacobs and others as yet unknown.

4. He has discussed all the circumstances of the above offenses with Special Agent Ray I. Shryock of the Chicago, Illinois, Office of the Federal Bureau of Investigation who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Shryock (attached to this application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Irving Kahn, Jake Jacobs and others as yet unknown have committed and are committing offenses involving the use of interstate telephone communication facilities for the transmission of bets and betting information and in aid of a racketeering enterprise (gambling), in violation, respectively, of Sections 1084 and 1952 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications of Irving Kahn, Jake Jacobs, and unknown others concerning these offenses will be obtained through the interception, authorization for which is herein applied for. In particular, these wire communications will concern the receipt and dissemination of "line" information, and the placing and accepting of bets on sporting events.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to believe that telephone numbers 675-9125 and 675-9126, located at 9126 Four Winds Way, Skokie, Ill., a private residence and subscribed to by Irving Kahn, have been used and are being used by Irving Kahn and unknown others, in connection with the commission of the above described offenses.

(e) there is probable cause to believe that telephone number 973-1833, located at 7524 North Damen, Chicago, Ill., a private residence and subscribed to by Jake Jacobs has been and is being used by Jake Jacobs and unknown others, in connection with the commission of the above described offenses.

5. No previous application has been made to any Judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facilities, or places specified herein.

WHEREFORE, your affiant believes that probable cause exists to believe that Irving Kahn, Jake Jacobs, and others as yet unknown are engaged in the commission of offenses involving the use of interstate telephone communication facilities for the transmission of bets and betting information and in the aid of a racketeering enterprise (gambling), and a conspiracy to do so; that Irving Kahn, Jake Jacobs, and others as yet unknown have used, and are using the above-described three telephones, as hereinbefore designated, in connection with the commission of the above-described offenses; that communications of Irving Kahn, Jake Jacobs, and others as yet unknown concerning these offenses will be intercepted to and from the above-described three telephones, as hereinbefore designated; and that normal investigative procedures appear unlikely to succeed and are too dangerous to be used.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Ray I. Shryock, which is attached hereto and made a part hereof, affiant requests this Court to issue an order, pursuant to the power conferred on it by Section 2518

of Title 18, United States Code, authorizing the Federal Bureau of Investigation of the United States Department of Justice to intercept wire communications to and from the above-described three telephones until communications are intercepted which reveal the manner in which Irving Kahn, Jake Jacobs, and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of bets and betting information and in aid of a racketeering enterprise (gambling), and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of that order, whichever is earlier.

/s/ Douglas P. Roller
DOUGLAS P. ROLLER
Special Attorney
Organized Crime and Racketeering Section, Criminal Division
United States Department of Justice

Subscribed and sworn to before me this 20th day of March, 1970, at Chicago, Illinois.

/s/ William J. Campbell
United States District Judge

EXHIBIT "A"

DEPARTMENT OF JUSTICE

Washington 20530

Mar. 20, 1970

Mr. Douglas P. Roller
Special Attorney
Chicago Strike Force
Chicago, Illinois

Dear Mr. Roller:

This is with regard to your request to make application pursuant to the provisions of Section 2518 of Title 18, United States Code for an order of the Court authorizing the Federal Bureau of Investigation to intercept wire communications for a fifteen (15) day period to and from three telephones, two subscribed to by Irving Kahn, both located at 9126 Four Winds Way, Skokie, Illinois, and carrying telephone numbers 675-9125 and 675-9126, respectively, one telephone subscribed to by Jake Jacobs, located at 7524 North Damen, Chicago, Illinois, and carrying telephone number 973-1833, in connection with the investigation into possible violations of 18 U.S.C. 1084, 1952 and 371 by Irving Kahn, Jake Jacobs and unknown others.

I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe that Irving Kahn, Jake Jacobs and others as yet unknown have committed and are committing offenses enumerated in Section 2516 of Title 18, United States Code, to wit: violations of Sections 1084, 1952 and 371 of Title 18, United States Code. I have further determined that there exists probable cause to believe that the above-named persons will make use of the above-described three telephones in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investi-

gative procedures are unlikely to succeed or are too dangerous to be used.

Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an order pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications from the above-described three telephones for a period of fifteen (15) days.

Sincerely,

/s/ Will Wilson
WILL WILSON
Assistant Attorney General

AFFIDAVIT

Ray I. Shryock, Special Agent, Federal Bureau of Investigation, Chicago, Illinois, being duly sworn, states:

1. I am an "investigative or law enforcement officer . . . of the United States" within the meaning of Section 2510 (7) of Title 18, United States Code—that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

2. This application seeks authorization to intercept wire communications concerning offenses involving violations of Section 1084, 1952 and 371, Title 18, United States Code, which have been and are being committed by Irving Kahn and others by use of telephones subscribed to by Kahn located at 9126 Four Winds Way, Skokie, Illinois, bearing numbers 675-9125 and 675-9126, and telephone number 973-1833 subscribed to by Jake Jacobs, 7524 North Damen, Chicago, Illinois.

3. I have personally conducted the investigation of this offense, and because of my personal participation in this investigation and of reports made to me by other agents of the Federal Bureau of Investigation, I am familiar with all circumstances of the offense. Based on this familiarity, I allege the facts contained in the numbered paragraphs below to show that:

a. There is probable cause for a belief that Irving Kahn and Jake Jacobs have been and are now committing an offense involving the use of telephone communication facilities in interstate commerce with intent to carry on the offense of wagering on sports events in violation of Chapter 28 of the Illinois Revised Statutes, Article 28-1 (a) (2) (10) and also, thereby in violation of Sections 1084 and 1952, Title 18, United States Code;

b. There is probable cause for belief that wire communications concerning that offense will be obtained through the interceptions of them, authorization for which is applied for herein;

c. Normal investigative procedures reasonably appear unlikely to succeed.

d. There is probable cause to believe that telephone numbers 675-9125 and 675-9126 located at the residence of Irving Kahn, 9126 Four Winds Way, Skokie, Illinois, and telephone bearing number 973-1833 located at the residence of Jake Jacobs, 7524 North Damen, Chicago, Illinois, are being used and will be used in carrying out the offenses detailed in 3 a. above, all of which appears more fully hereafter.

4. Special Agent Dennis W. Shanahan, Federal Bureau of Investigation, advised me that based on his eight years experience investigating gambling activities he considers a lay-off operation as a procedure whereby one bookmaker turns over to another operator some of the bets he has accepted. This is generally done when a bookmaker feels he has over extended himself or when his books get out of balance because of an unusually heavy tide of betting on one particular horse or athletic team.

5. A confidential source in Illinois has been contacted by Special Agents of the FBI on a regular basis since 1964, and has furnished a considerable amount of information regarding criminal activities, including gambling, which has been corroborated through independent investigation by Special Agents of the FBI. Special Agent Paul B. Frankfurt related to me that this source has furnished information to him on gambling matters which resulted in six local gambling raids, ten individuals being arrested, and two of these individuals being convicted on gambling charges.

Special Agent Paul B. Frankfurt related to me that this source advised him on March 13, 1970, that Irving Kahn is a sports bookmaker operating from his residence at 9126 Four Winds Way, Skokie, Illinois, using telephone numbers 675-9125 and 675-9126. This source has personal knowledge that Kahn has accepted bets in the past on football, baseball, basketball, and hockey games. Kahn is presently handling basketball and hockey game bets. This source has personally placed bets with Kahn at least once a week, and as recently as March 10, 1970, he called Kahn at telephone 675-9126 and placed a bet with him.

This source further advised that Kahn related to him on December 9, 1969 that he (Kahn) and Jake Jacobs, who resides 7524 North Damen, Chicago, Illinois, telephone number 973-1833, work together in Kahn's bookmaking operation. Kahn's bettors contact either Kahn or Jacobs to place their bets. When Kahn is out of town or vacationing all bettors will call Jacobs, and vice-versa when Jacobs is away.

This source was and is a bookmaker in the Chicago area and has been a close associate of Kahn for past five years. He is a recipient of his information because of this association and the fact that Kahn trusts him.

The source further stated that on March 2, 1970, Kahn advised that he (Kahn) and Jacobs are taking lay-off bets from several out-of-state bettors including Joe Solutin from Anderson, Indiana. Kahn described Solutin to source as a bookmaker, who takes bets from individuals who reside in the area of Anderson, Indiana. Kahn also advised source that he (Kahn) and Jacobs either call Solutin at Anderson, Indiana, and accept his lay-off bets or Solutin will call either Kahn at Skokie, Illinois, or Jacobs at Chicago, Illinois, to place lay-off bets.

Kahn related to source on March 2, 1970, that he (Kahn) or Jacobs will either call Solutin or receive a call from him prior to game time to accept wagers (lay-off bets) and then Solutin will either call Kahn or Jacobs, or one of them will call Solutin, concerning the outcome of the game usually within a day or two after the game has been played. Kahn told source that most of the calls that are made between Kahn and Jacobs to or from Solutin are made during the weekends because during the week all three accept wagers from their respective local customers.

Kahn told source on March 2, 1970, that when Solutin receives a large amount or number of bets he (Solutin) will call either Kahn or Jacobs to lay off some of the wagers. Kahn continued by stating that if Solutin receives a small number of bets Solutin would not call either Kahn or Jacobs.

Kahn also mentioned to source on March 2, 1970, that several bookmakers call him (Kahn) from out of state

to lay off some of their bets; however, Kahn did not identify them to the source.

6. Records of the Illinois Bell Telephone Company were reviewed by Special Agent Ray I. Shryock on February 4, 1970, relative to telephone numbers 675-9126 and 675-9125 located at 9126 Four Winds Way, Skokie, Illinois, the residence of Irving Kahn. This review disclosed the following numbers in Anderson, Indiana, have been called from numbers 675-9126 and 675-9125:

Day of Week	Date	Number Called	Length of Time	Time
Saturday	10/ 4/69	643-5645 (Joe Solution)	10	22:03
Sunday	10/26/69	643-5645 "	8	12:25
Thursday	11/20/69	643-5645 "	12	9:45
Friday	11/21/69	643-5645 "	5	12:40
	11/26/69	644-9754 (Pastime Cigar Store)	2	11:50
	11/27/69	644-9754 "	1	13:00
Wednesday	12/ 3/69	643-5645 (Joe Solutin)	5	17:15
Saturday	12/ 6/69	643-5645 (Joe Solutin)	6	17:33
Saturday	12/20/69	643-5645 (Joe Solutin)	3	10:25
Sunday	1/11/70	643-5645 (Joe Solutin)	(Two calls)	

7. Special Agent Herbert T. Bradshaw of the FBI advised me he personally reviewed records of the Indiana Bell Telephone Company, Anderson, Indiana, and found the following long distance calls billed to telephone number 643-5645 subscribed to by Joe Solutin, 2005 West 14th Street, Anderson, Indiana:

Day of Week	Date	Number Called	Length of Time	Time
Sunday	9/14/69	675-9126 (Irving Kahn) Skokie, Illinois	14	14:22
Sunday	10/19/69	675-9126 Skokie, Illinois	10	16:37
Saturday	11/ 1/69	675-9126 Skokie, Illinois	6	17:31
Saturday	11/22/69	675-9126 Skokie, Illinois	7	10:54
Saturday	12/13/69	675-9126 Skokie, Illinois	13	14:20

Day of Week	Date	Number Called	Length of Time	Time
		Jake		
	10/25/69	973-0361 (Jacobs) Chicago, Illinois	13	18:47
	10/26/69	973-0361 Chicago, Illinois	11	13.08
	10/27/69	973-0361 Chicago, Illinois	1	23:42
	11/ 1/69	973/0361 Chicago, Illinois	1	1:12
	11/ 3/69	973-0361 Chicago, Illinois	2	10:59
	11/11/69	973-0361 Chicago, Illinois	14	21:55
	11/25/69	973-0361 Chicago, Illinois	18	20:23
	11/30/69	973-0361 Chicago, Illinois	19	23:07
	12/ 3/69	973-0361 Chicago, Illinois	10	19:32

Records further indicate that Anderson, Indiana, telephone number 642-6465 is listed to John L. Zoom, 925 Main Street, Anderson, Indiana. This address is for Pastime Cigar Store. Number 644-9754 is a coin telephone listed to Pastime Cigar Store and responsible person is Harry Taylor.

It should be noted that Chicago, Illinois, telephone number 973-0361 was changed on December 5, 1969, to telephone number 973-1833. The subscriber to both of these numbers is Jake Jacobs, 7524 North Damen, Chicago, Illinois.

Special Agent Herbert T. Bradshaw of the FBI advised me that a confidential source employed by the United States Government, Anderson, Indiana, told him on December 4, 1969, that he personally knows by observation and direct contact that Joe Solutin is an employee of the Pastime Cigar Store located at 925 Main Street, Anderson, Indiana.

8. Records of the Illinois Bell Telephone Company were reviewed by Special Agent Ray I. Shryock on March 4, 1970, relative to telephone numbers 973-0361 located

at the residence of Jake Jacobs, 7524 North Damen, Chicago, Illinois. Records show this number changed to 973-1833 on December 5, 1969; however, is still listed to Jacobs at 7524 North Damen, Chicago, Illinois. This review disclosed the following numbers in Anderson, Indiana, have been called from numbers 973-0361 and 973-1833:

Day of Week	Date	Number Called	Length of Time	Time
Saturday	10/25/69	643-5645 (Joe Solutin) Anderson, Indiana	5	4:01PM
Saturday	10/25/69	643-5645	2	4:34PM
Wednesday	10/29/69	643-5645	8	7:57PM
Saturday	11/ 1/69	642-6465 (Pastime Cigar Store) Anderson, Indiana	3	2:26PM
Sunday	11/16/69	643-5645 (Joe Solutin)	9	8:11 p.m.
Sunday	11/23/69	643-5645 "	9	
Thursday	12/11/69	643-5645 "	14	7.17 p.m.
Sunday	12/21/69	643-5645 "	4	5:35 p.m.
Saturday	1/03/70	643-5645 "	1	9:10 a.m.
Saturday	1/10/70	643-5645 "	6	
Sunday	1/11/70	643-5645 "	5	2:42 p.m.
Monday	1/26/70	643-5645 "	11	8:16 p.m.

9. Another confidential source in Illinois has been contacted by Special Agents of the FBI since 1968 and has regularly furnished information regarding criminal activities on a confidential basis. The reliability of this source is based on the fact that this source has furnished information regarding gambling activities resulting in eight local raids, ten arrests, and two local convictions and one pending Federal conviction.

Special Agent Logan C. Pickerl advised me that this source told him on March 10, 1970, that Burt Kozak is a big sports bettor in the Chicago area and formerly placed sports bets with Robert Likas until Likas' arrest by Cook County Sheriff's Police on January 12, 1969. Kozak told source on March 10, 1970 that since January 1969, he, Kozak has placed most of his sports bets with Irving Kahn. Kozak further advised source on March

10, 1970, that Kahn is a bookmaker who operates from his residence at 9126 Four Winds Way, Skokie, Illinois, using telephone 675-9126, and he has personally placed bets with Kahn at this telephone number.

Source is an active bettor and both he and Kozak placed bets with Likas until his arrest. At that time both obtained different bookmakers. Kozak told source on March 10, 1970, that he is now betting with Kahn and has been since January, 1969.

10. Records of the Illinois Bell Telephone Company, Chicago, Illinois, were reviewed by Special Agent Ray I. Shryock and disclosed that 12 telephone calls were made to telephone number 272-8633 from September 27, 1969, to November 18, 1969, and charged to telephone numbers 675-9126 and 675-9125 located at the residence of Irving Kahn, 9126 Four Winds Way, Skokie, Illinois. The records also disclosed the identity and address of subscriber of this number to be:

Number Called	Subscriber	Dates Called
272-8633	Kurt Kozak 923 Suffield Terrace, Northbrook, Illinois	9/27/69 (2 calls); 9/29/69 10/13/69 (3 calls); 10/14/69; 11/ 6/69 (2 calls); 11/15/69 (2 calls); 11/18/69.

Illinois Bell Telephone Company records as further checked by Special Agent Ray I. Shryock disclose that Chicago, Illinois, telephone number 973-0361 was changed on December 5, 1969, to 973-1833. The subscriber to this number is Jake Jacobs, 7524 North Damen, Chicago, Illinois.

Special Agent Jerry H. Breidenfeld, FBI, advised me that Illinois Bell Telephone Company records as reviewed by him on December 18, 1969, indicate that there would be no record of calls made by Kahn to Jacobs as both reside in same toll area.

11. Another confidential source in Illinois, who is engaged in gambling activities, has been contacted by Special Agents of the FBI on a regular basis since 1963, and has furnished a considerable amount of information regarding various criminal activities, including gambling, which has been corroborated through independent investigation by Special Agents of the FBI. The reliability of this source is further based on the fact that on four occasions in the past, information furnished by him has resulted in the issuance of local warrants and complaints for search warrants. The execution of these search warrants resulted in four successful local gambling raids, the arrests of seven individuals on local gambling charges and two local gambling convictions.

Special Agent Paul J. Neumann of the FBI told me that this source related to him on February 6, 1970, that Irving Kahn is a bookmaker who operates from his residence at 9126 Four Winds Way, Skokie, Illinois, using telephone numbers 675-9126 and 675-9125.

This source meets regularly with Kahn and with other bookies, and Kahn relayed this information at one of these meetings. At a meeting on February 2, 1970, Kahn told source he was still using telephone numbers 675-9125 and 675-9126 in his gambling operation.

Source has personal knowledge that Jake Jacobs is working for Kahn in Kahn's bookmaking operation. Kahn related to source on February 2, 1970, that Jacobs accepts bets from Kahn's customers at Jacobs' residence, located at 7524 North Damen, Chicago, Illinois, using telephone number 973-1833. Source personally knows Jacobs and formerly called him for sports information at telephone number 973-0361 until early December, 1969, when this number was changed to 973-1833. Kahn further related to source that Jacobs collects for Kahn from all bettors placing wagers with Kahn and Jacobs.

The source also stated that he personally knows that Jacobs was formerly a bartender employed by Kahn at the Lakeland Lounge, 4539 North Sheridan Road, Chicago, Illinois.

12. Records of the Chicago Police Department, Record Bureau, 11th and State, Chicago, Illinois, were reviewed

by me on January 29, 1970, and disclosed that Jake Jacobs, Chicago Police Department IR number 158598 described as white male, born January 17, 1923, was arrested by the Chicago Police Department during January, 1967, for pandering with Irving Kahn. At the time of the arrest Jacobs was a bartender employed at the Lakeland Lounge, 4539 North Sheridan Road, Chicago, Illinois, which at that time was owned by Irving Kahn.

13. A survey was made by me of the telephone records for Irving Kahn, Jake Jacobs and Joe Solutin and indicate the following:

Survey of Toll Records

Day	Date	Parties	Length of Call	Time
Saturday	10/ 4/69	Kahn to Solutin	10	10:03 PM
Sunday	10/19/69	Solutin to Kahn	10	4:37 PM
Saturday	10/25/69	Solutin to Kahn	5	4:01 PM
Saturday	10/25/69	Solutin to Kahn	2	4:34 PM
Saturday	10/25/69	Solutin to Jacobs	13	6:47 PM
Sunday	10/26/69	Kahn to Solutin	8	12:25 PM
Sunday	10/26/69	Solutin to Jacobs	11	1:08 PM
Monday	10/27/69	Solutin to Jacobs	1	11:42 PM
Wednesday	10/29/69	Jacobs to Solutin	8	7:57 PM
Saturday	11/ 1/69	Solutin to Jacobs	1	1:12 AM
Saturday	11/ 1/69	Jacobs to (642-6465) (Pastime Cigar Store	3	2:26 PM
Saturday	11/ 1/69	Solutin to Kahn	6	5:31 PM
Monday	11/ 3/69	Solutin to Jacobs	2	10:59 AM
Tuesday	11/11/69	Solutin to Jacobs	14	9:55 PM
Sunday	11/16/69	Jacobs to Solutin	9	8:11 PM
Thursday	11/20/69	Kahn to Solutin	12	9:45 PM
Friday	11/21/69	Kahn to Solutin	5	12:40 PM
Saturday	11/22/69	Solutin to Kahn	7	10:54 AM
Sunday	11/23/69	Jacobs to Solutin	9	
Wednesday	11/25/69	Solutin to Jacobs	18	8:23 PM

Day	Date	Parties	Length of Call	Time
Thursday	11/26/69	Kahn to (644-9754) (Pastime Cigar Store)	2	11:50 AM
Friday	11/27/69	Kahn to (644-9754) (Pastime Cigar Store)	1	1:00 PM
Monday	11/30/69	Solutin to Jacobs	19	11:07 PM
Wednesday	12/ 3/69	Kahn to Solutin	5	5:15 PM
Wednesday	12/ 3/69	Solutin to Jacobs	10	7:32 PM
Saturday	12/ 6/69	Kahn to Solutin	6	5:33 PM
Thursday	12/11/69	Jacobs to Solutin	14	7:17 PM
Saturday	12/13/69	Solutin to Kahn	13	2:20 PM
Saturday	12/20/69	Kahn to Solutin	3	10:25 AM
Sunday	12/21/69	Jacobs to Solutin	4	5:35 PM

14. The informants named herein have all advised they will not testify to information they have provided.

Past experience has shown even though gambling "customers" are identified they are unwilling to furnish information to law enforcement agents or officials inquiring into gambling activities. This is even more true when the "customer" is a professional gambler himself and is requested to give information concerning a gambling operation. Experience has further established that even though telephone toll records are available which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have succeeded and would succeed only to a limited degree in establishing that Irving Kahn and Jake Jacobs are involved in gambling activities on the telephone. Furthermore, such investigative techniques as physical surveillance and examination of the records obtainable on Irving Kahn and Jake Jacobs contain little probability of success in securing presentable evidence. Therefore, the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violations of these statutes.

15. No other application for authorization to intercept wire or oral communications from the telephones located at the residence of Irving Kahn, 9126 Four Winds Way, Skokie, Illinois, bearing numbers 312-675-9125 and 312-675-9126 and a telephone located at the residence of Jake Jacobs, 7524 North Damen, Chicago, Illinois, having telephone number 973-1833, is known to have been made.

Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigations of gambling activities, normal investigative procedures reasonably appear to be unlikely to succeed in establishing that Irving Kahn and Jake Jacobs are involved in gambling activities on the telephone in violation of Federal laws. My experience and the experience of other Agents have shown that gambling raids and searches of gamblers and their gambling establishments have not in the past resulted in the gathering of physical or other evidence to prove all elements of the offenses. I have found that through my experience and the experience of other Special Agents who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers immediately prior to or during a physical search sometimes destroy these records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish the interstate elements of Federal offenses, because such records are difficult to interpret and many times are of little or no significance without further knowledge of the gambler's activity and its interstate nature.

The activity to be electronically covered is believed to represent a continuing criminal conspiracy. It is further believed that the evidence sought will be obtained on a continuing basis on several days succeeding the first receipt of communications which is the object of this request. Therefore, it is requested that this intercept not terminate when the sought communications are first intercepted which reveal the manner in which Irving Kahn,

Jake Jacobs, and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of bets and betting information and in aid of racketeering enterprises and which reveal the identities of his confederates, the places of operation and the nature of the conspiracy involved therein, or for a period of seven days from the date of the order, whichever is earlier.

/s/ Ray I. Shryock
RAY I. SHRYOCK
Special Agent
Federal Bureau of Investigation

Subscribed and sworn before me this 20th day of March, 1970.

/s/ Campbell
U. S. D. J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 70C 673

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

TO: Special Agents of the Federal Bureau of Investigation, United States Department of Justice

Application under oath having been made before me by DOUGLAS P. ROLLER, an attorney with the Organized Crime and Racketeering Section of the Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the court finds:

(a) there is probable cause to believe that Irving Kahn, Jake Jacobs and others as yet unknown have committed and are committing offenses involving the use of interstate telephone communication facilities for the transmission of bets and betting information and in aid of a racketeering enterprise (gambling), in violation, respectively, of Sections 1084 and 1952 of Title 18, United States Code, and are conspiring to commit such offenses, in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications of Irving Kahn, Jake Jacobs and unknown others concerning these offenses will be obtained through the interception, authorization

for which is herein applied for. In particular, these wire communications will concern the receipt and dissemination of "line" information, and the placing and accepting of bets on sporting events.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to believe that the two telephones, both located at 9126 Four Winds Way, Skokie, Illinois, a private residence, and subscribed to by Irving Kahn, and carrying telephone numbers 675-9125 and 675-9126, respectively, have been and are being used by Irving Kahn and others as yet unknown in connection with the commission of the above-described offenses.

(e) there is probable cause to believe that a telephone located at 7524 North Damen, Chicago, Illinois, a private residence, and subscribed to by Jake Jacobs, and bearing telephone number 973-1833, has been and is being used by Jake Jacobs and others as yet unknown in connection with the commission of the above-described offenses.

WHEREFORE, IT is hereby ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, to:

(a) (1) intercept wire communications of Irving Kahn and others as yet unknown concerning the above-described offenses to and from two telephones, subscribed to by Irving Kahn, both located at 9126 Four Winds Way, Skokie, Illinois, a private resi-

dence, and carrying telephone numbers 675-9125 and 675-9126, respectively.

(a) (2) intercept wire communications of Jake Jacobs and others as yet unknown concerning the above-described offenses to and from a telephone subscribed to by Jake Jacobs, located at 7524 North Damen, Chicago, Illinois, a private residence, and carrying telephone number 973-1833.

(b) such interception shall not automatically terminate when the type of communications described above in paragraph (b) have first been obtained, but shall continue until communications are intercepted which reveal the manner in which Irving Kahn, Jake Jacobs, and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of bets and betting information and in aid of a racketeering enterprise (gambling), and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of this order, whichever is earlier.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective or, in any event, at the end of fifteen (15) days from the date of this order.

PROVIDING ALSO, that DOUGLAS P. ROLLER shall provide the court with a report on the 5th and 10th day following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

/s/ Campbell
Judge

Date: March 20, 1970

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

70C 673

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER

ORDER AUTHORIZING USE OF A PEN REGISTER

TO: Special Agents of the Federal Bureau of Investigation, United States Department of Justice

Affidavit having been made before me by Ray I. Shryock, Special Agent of the Federal Bureau of Investigation, United States Department of Justice, and full consideration having been given to the matters set forth therein the court finds:

(a) there is probable cause to believe that Irving Kahn, Jake Jacobs and others as yet unknown have committed and are committing offenses involving the use of interstate telephone communication facilities for the transmission of bets and betting information and in aid of a racketeering enterprise (gambling), in violation, respectively, of Sections 1084 and 1952 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that the two telephones subscribed to by Irving Kahn, located at 9126 Four Winds Way, Skokie, Illinois, a private residence, and bearing telephone numbers 675-9125 and 675-9126, respectively, have been used and are being used by Irving Kahn, and others as yet unknown in connection with the commission of the above-described offenses.

(c) there is probable cause to believe that the telephone subscribed to by Jake Jacobs and located at

7524 North Damen, Chicago, Illinois, a private residence, and bearing telephone number 973-1833, has been and is being used by Jake Jacobs and others as yet unknown in connection with the commission of the above-described offenses.

WHEREFORE, it is hereby ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized to:

(a) install mechanical devices on the two telephones subscribed to by Irving Kahn, located at 9126 Four Winds Way, Skokie, Illinois, a private residence and bearing the telephone numbers 675-9125 and 675-9126, respectively, which will reveal the telephone numbers of all outgoing calls dialed from the above-described telephones.

(b) install a mechanical device on the telephone subscribed to by Jake Jacobs, located at 7524 North Damen, Chicago, Illinois, a private residence, and bearing telephone number 973-1833, which will reveal the telephone numbers of all outgoing calls dialed from the above-described telephone.

(c) such mechanical devices shall continue in operation until the telephone numbers of all outgoing calls dialed lead to the identities of Irving Kahn's and Jake Jacob's confederates and their places of operation, or for a period fifteen (15) days from the date of this Order, whichever is earlier.

PROVIDED THAT, this authorization to install and operate the above-described mechanical devices must terminate upon attainment of the authorized objective or, in any event, at the end of fifteen (15) days from the date of this Order.

/s/ Campbell
Judge

DATE March 20, 1970

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SUPPRESSED
No. 70 C 673

[Filed Mar. 25, 1970]

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

STATUS REPORT OF INTERCEPTION OF WIRE COMMUNICATIONS

This report is being submitted by Douglas P. Roller, Special Attorney, Department of Justice, pursuant to court order dated March 20, 1970, authorizing the interception of wire communications at telephone numbers 675-9126, 675-9125 and 973-1833.

Installation of the interception devices on numbers 675-9126 and 675-9125 was effectuated at 5:15 P. M., Friday, March 20, 1970. Installation of the interception device on phone number 973-1833 was effectuated at 6:28 P. M., Friday, March 20, 1970.

Termination of the interception of wire communications on phone numbers 675-9126 and 675-9125 was effectuated at 2:45 P. M., Wednesday, March 25, 1970. Termination of the interception of wire communications on number 973-1833 was effectuated at 6:00 P. M., Tuesday, March 24, 1970.

Interception of wire communications on the above numbers was terminated because the authorized objective of such interception had been achieved. The objective was achieved as a result of obtaining the following information:

1. On Friday, March 20, 1970, no gambling or betting activity of any consequence occurred on any of the telephone numbers.

2. On Saturday, March 21, 1970, approximately fifty (50) calls were made to numbers 675-9126 and 675-9125, placing bets on N.C.A.A. games. These bets totalled approximately $15,000.

3. On Saturday, March 21, 1970, Irving Kahn called his wife twice on number 675-9125 from Wilcox, Arizona and discussed gambling activities and losses.

4. On Saturday, March 21, 1970, Mrs. Kahn, on two occasions, discussed with a known gambling figure the number of bets placed, the amount of these bets and the identity of the bettors, by numbers. These conversations took place on either number 675-9126 or number 675-9125.

5. On Monday, March 23, 1970, Irving Kahn discussed the results of Saturday's betting with a known gambling figure on either telephone number 675-9126 or number 675-9125.

6. On Monday and Tuesday, March 23 and 24, 1970, Kahn told various callers that betting will resume when the baseball season arrives.

7. On Friday, March 20, 1970, Jake Jacobs called Joe Solutin on phone number 973-1833. They discussed Solutin going on vacation.

8. Joe Solutin called Jake Jacobs at number 973-1833 from Florida—once on Sunday, March 22, 1970 and once on Monday, March 23, 1970. During these calls, discussion was had concerning the whereabouts of Irving Kahn.

9. On Monday, March 23, 1970 Jake Jacobs talked to a caller on phone number 973-1833 about Kahn's gambling operation.

10. No basketball-related discussion occurred over any of the phone numbers on Tuesday, March 24, 1970.

The original tape recordings of intercepted wire communications on phone numbers 675-9126, 675-9125 and 973-1833 will be turned over to the court immediately upon completion of the copying of these tapes.

The information contained herein is accurate to the best of my knowledge. Written reports to me were made by Special Agents of the Federal Bureau of Investigation from their recall of the intercepted conversations rather than a detailed study of transcripts of the intercepted communications.

/s/ Douglas P. Roller
DOUGLAS P. ROLLER
Special Attorney
Department of Justice

IN THE UNITED STATES DISTRICT COURT

* * * (Caption—No. 71 CR 174) * * *

(Filed Feb 24 1971)

The Special February 1971 Grand Jury charges:

On or about March 21, 1970, in the Northern District of Illinois, Eastern Division, the defendants, Irving Kahn and Minnie Kahn, did use and cause to be used a facility in interstate commerce, that is, a telephone between Skokie, Illinois and Wilcox, Arizona, with the intent to promote, manage, establish and carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit, gambling, in violation of the laws of the State of Illinois, to wit, Illinois Revised Statutes, Chapter 38, Section 28-1(a), (2), and (10) and thereafter did perform acts of promotion, management, establishment and carrying on of the said unlawful activity.

In violation of Title 18, United States Code, Section 1952.

A True Bill:

/s/ Eldred H. Du Sold
Foreman

/s/ William J. Bauer
United States Attorney

LAH:lls

IN THE UNITED STATES DISTRICT COURT

• • • (Caption—Docket No. 71 CR 174) • • •

MOTION TO SUPPRESS

(Filed Apr 27 1971)

Now comes Minnie Kahn, by her attorneys, Edward J. Calihan, Jr., and Anna R. Lavin, and moves the Court to suppress any and all of her conversations illegally eavesdropped upon from her residence at 9126 Four Winds Way, Skokie, Illinois, on the grounds that:

1. They were secured without any warrant in law.
2. The said defendant Minnie Kahn incorporates by reference the matters and things set forth in the Motion to Suppress Evidence filed jointly by her and her co-defendant Irving Kahn this day.

Wherefore, this defendant moves the Court to direct the government to make answer to the allegations of this Motion, and if any made thereunder, to conduct a hearing on issues of fact, and thereafter to suppress all evidence obtained as a result of these allegal intrusions, and any leads secured therefrom, in any court and in any proceedings.

MINNIE KAHN
One of the defendants herein

By: /s/ Edward J. Calihan
EDWARD J. CALIHAN, JR.

And: /s/ Anna R. Lavin
ANNA R. LAVIN
Her Attorneys

IN THE UNITED STATES DISTRICT COURT

• • • (Caption—Docket No. 71 CR 174) • • •

MOTION TO SUPPRESS

(Filed—Apr 27 1971)

Now comes the defendants, Minnie Kahn and Irving Kahn, by their attorneys, Edward J. Calihan, Jr., and Anna R. Lavin, and represents to this Honorable Court as follows:

1. That certain property in which they have an interest, to wit: the existence and contents of telephonic communications, to and from their residence at 9126 Four Winds Way, Skokie, Illinois, have been seized from their possession in violation of law and of the Fourth and Fifth Amendments to the Constitution of the United States.

2. That these unauthorized intrusions of their privacy were, on information and belief, conducted pursuant to a purported order authorizing interception of wire communications and a purported order authorizing use of a pen register, both issued in Cause No. 70 C 673 (Application of the United States of America In The Matter of an Order Authorizing the Interception of Wire Communications In The Matter of an Order Authorizing the Use of a Pen Register) issued by The Honorable William J. Campbell, on March 20, 1970.

3. That, on information and belief, the order described in paragraph 2 above, authorizing the interception of wire communications was entered pursuant to a certain application executed by one Douglas P. Roller, described as an attorney of the United States Department of Justice, which incorporates by reference an affidavit of one Ray I. Shryock, an agent of the Federal Bureau of Investigation, requesting an order authorizing the interception of wire communications.

4. That, on information and belief, the order authorizing the use of the pen register was entered without

proper application therefor and thus, was in violation of Title 18, U.S.C., Section 2516, 2517, and 2518.

5. That, otherwise, the order authorizing interceptions of wire communications is in excess of that deemed even to be necessary by the applicant, whose application is based, not on personal knowledge, hearsay, or investigation, but upon the report of a Special Agent of the Federal Bureau of Investigation to-wit: Special Agent Shryock.

6. That the application of the United States of America for an order authorizing the interception of wire communications, which application incorporates the affidavit of Special Agent Shryock of the Federal Bureau of Investigation, is deficient and insufficient in law for the issuance of the orders described in paragraph 2 hereof on the following grounds:

A. Paragraph (c) of the authorization order reads:

> "Normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used."

The affidavit of Douglas P. Roller, (who was without either personal, investigative or hearsay knowledge), is in that precise language. See Paragraph 4(c).

The affidavit, however, of Agent Shryock, makes no reference to normal investigative procedures being "too dangerous to be used." It states merely (see Paragraph 3(c) thereof) as follows:

> "c. Normal investigative procedures reasonably appear unlikely to succeed."

This conclusion is not founded on any factual statement in Special Agent Shryock's affidavit, and is, in fact, contrary to the factual statements in the affidavit, for the whole predicate of this statement is contained in the narrative of Paragraph 14 of the affidavit which provides:

"14. The informants named herein have all advised they will not testify to information they have provided.

"Past experience has shown even though gambling 'customers' are identified they are unwilling to furnish information to law enforcement agents or officials inquiring into gambling activities. This is even more true when the 'customer' is a professional gambler himself and is requested to give information concerning a gambling operation. Experience has further established that even though telephone toll records are available which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have succeeded and would succeed only to a limited degree in establishing that Irving Kahn and Jake Jacobs are involved in gambling activities on the telephone. Furthermore, such investigative techniques as physical surveillance and examination of the records obtainable on Irving Kahn and Jake Jacobs contain little probability of success in securing presentable evidence. Therefore, the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violations of these statutes."

That the above narrative and conclusionary "justification" contained in Paragraph 14 are absolutely contradictory of the factual allegations of Agent Shryock's affidavit, to-wit:

"5. A confidential source in Illinois has been contacted by Special Agents of the FBI on a regular basis since 1964, and has furnished a considerable amount of information regarding criminal activities, including gambling, which has been corroborated through independent investi-

gation by Special Agents of the FBI. Special Agent Paul B. Frankfurt related to me that this source has furnished information to him on gambling matters which resulted in six local gambling raids, ten individuals being arrested, and two of these individuals being convicted on gambling charges.

* * * *

"9. Another confidential source in Illinois has been contacted by Special Agents of the FBI since 1968 and has regularly furnished information regarding criminal activities on a confidential basis. The reliability of this source is based on the fact that this source has furnished information regarding gambling activities resulting in eight local raids, ten arrests, and two local convictions and one pending Federal conviction.

* * * *

"11. Another confidential source in Illinois, who is engaged in gambling activities, has been contacted by Special Agents of the FBI on a regular basis since 1963, and has furnished a considerable amount of information regarding various criminal activities, including gambling, which has been corroborated through independent investigation by Special Agents of the FBI. The reliability of this source is further based on the fact that on four occasions in the past, information furnished by him has resulted in the issuance of local warrants and complaints for search warrants. The execution of these search warrants resulted in four successful local gambling raids, the arrests of seven individuals on local gambling charges and two local gambling convictions."

Therefore, there is no factual basis upon which the Magistrate could come to his own conclusion that

"Normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used."

B. Further, records of the Illinois Bell Telephone Company and records of the Indiana Bell Telephone Company were reviewed and used as part of this affidavit in violation of Title 42, U.S.C., Section 605, and Title 18, U.S.C., Section 2515. (See Shryock's Affidavit Paragraphs 6, 7, 8, 10, and 13)

C. That, further, the affidavit of Special Agent Shryock seeks a continuing interception of telephone facilities over a period of seven days because the extension beyond the first sought interception will "reveal the manner in which Irving Kahn" participates in the illegal use of interstate telephone facilities for the transmission of bets and betting information; yet the order allows a continuing telephonic communication surveillance for a period of fifteen days.

D. That the order authorizing the electronic intrusion leaves to the officer executing the sole discretion on what is encompassed in the direction that the intrusion shall terminate "as soon as practicable," nor is the "attainment of the authorized objective" defined in the order authorizing the intrusion.

E. That, further, the order authorizing the intrusion does not confine the interception to the communications of Irving Kahn, but extends to "and others yet unknown". (See Sub-paragraph (a), (b), and (d) of Order and Roller Affidavit Paragraphs 3, 4, (a), (b), and (d))

That the affidavit of Agent Shryock, who was the only person having investigative, personal, or hearsay knowledge, nowhere states facts sufficient to support any probable cause that "others yet unknown" were using, for illegal purposes, the telephones at 9126 Four Winds Way, Skokie, Illinois, a private residence.

F. That the affidavit of Special Agent Shryock refers to "others as yet unknown" for the first time on Page 18, the last page of the affidavit, and then

without any factual evidence to support the statement.

That, therefore, the authorization order is the equivalent of a "general warrant", and unconstitutional and void.

G. That the orders authorizing the electronic intrusion require the filing of reports on the 5th and 10th day, and there is no indication in the knowledge of these defendants that such reports were filed, nor if filed, considered by the issuing Judge.

H. That there was no restriction on the interception from the above-described telephone facility that they shall be conducted only when it is determined by voice recognition that Irving Kahn, himself, was using that telephone. See *United States* v. *Escandar*, S.D.Fla., 319 F. Supp. 295, 297. In fact, the authorization contained no specific restriction at all. See Sub-paragraph F above.

I. Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968, under which authority these orders presumably issued, is unconstitutional and void in that it violates the First, Fourth, and Fifth Amendments to the Constitution of the United States.

J. That the authorization of the continued surveillance after "the object to be obtained" (unspecified in application and order), is violative of Title 18, Section 2518(b) for failure to set out a "particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter."

K. That the execution of the authorization is illegal and void in that, the United States knew, or should have known, the occupants of 9126 Four Winds Way, Skokie, Illinois, and made no request for approval of the interception of any oral communications of the members of the household other than Irving Kahn, and yet, the communications of Minnie Kahn, Pamela Kahn, and Howard Kahn were recklessly and illegally intruded upon in contravention of Title 18, Section 2518(4)(a), U.S.C., and the

First, Fourth, and Fifth Amendments to the Constitution of the United States.

L. There was no reason stated on which to form a belief that conversations, allegedly violative of Federal Law, were, or would be, lengthy or numerous, and, therefore, the authorization was in excess of power in allowing a fifteen day surveillance. *United States* v. *Escandar*, S.D.Fla., 319 F. Supp. at 299.

M. There were no directions nor efforts to minimize the interception of communications sought. See 319 F. Supp. at 300.

N. There was no particular description of facts showing the continuity of criminality—federally prohibited—prior to the authorization of continuous interception.

O. That the failure to require stringent safeguards, acceptance of a minimal level of "reasonable cause," authorization beyond application, and beyond grounds for application divest this intrusion of any semblance of constitutionality or legality.

P. That Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which purports to authorize an unprecedented intrusion upon the privacy of the people requires a higher standards of "probable cause" than is presented by the application for the authorizations involved herein.

Q. The nature of the interceptions (which had been disclosed to the defendants) indicate that there was no continuing judicial supervision of the case, or that supervision was ineffective to the protection of constitutional rights.

R. That, further, the intrusion constitutes one, and several, illegal invasions of the marital relationship between Irving Kahn and Minnie Kahn, in violation of said defendants' right to privacy under the Ninth Amendment to the Constitution of the United States and the privilege of the marital relationship established in the common law and, therefore, the use of such communications are barred not only by the

Ninth Amendment and the common law but also by Title 18, Section 2517(4) which provides:

> "No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."

S. That the next preceding paragraph gains increased significance when considered with the necessary requirements to obtaining court permission to intrude, specifically a statement "as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," where direct testimony by either party of the conversations and, on information and belief, the indictment communication would be outlawed by law, and this procedure is being used to circumvent evidentiary outlawry.

Wherefore, these defendants move the Court to direct the Government to make answer to the allegations of this Motion, and if any made thereunder, to conduct a hearing on issues of fact, and thereafter to suppress all evidence obtained as a result of these illegal intrusions, and any leads secured therefrom, in any court and in any proceedings.

IRVING KAHN and MINNIE KAHN
Defendants

/s/ Edward J. Calihan, Jr.
EDWARD J. CALIHAN, JR.

and /s/ Anna R. Lavin
ANNA R. LAVIN
Their Attorneys

53 West Jackson Boulevard
Chicago, Illinois 60604
WAbash 2-3113

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 31, 1972

Before

Hon. WIN G. KNOCH, Senior Circuit Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

No. 71-1931

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

IRVING KAHN and MINNIE KAHN, DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, in so far as it is based upon the marital privilege ground, and is AFFIRMED in so far as it decided that the wiretap order did not authorize the interception of Minnie Kahn's conversations, in accordance with the opinion of this Court filed this day.

SUPREME COURT OF THE UNITED STATES

No. 72-1328

UNITED STATES, PETITIONER

v.

IRVING KAHN and MINNIE KAHN

ORDER ALLOWING CERTIORARI—Filed May 14, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

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No. 72-1328

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

IRVING KAHN AND MINNIE KAHN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 471 F. 2d 191. The opinion of the district court (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1972 (A. 39). A petition for rehearing was denied on January 29, 1973 (Pet. App. B). On February 20, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 30, 1973, and the petition was filed on that date. It was granted on May 14, 1973. The jurisdiction of this Court rest on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968 prohibits the interception of the incriminating conversations of a known user of a specifically described telephone, who was not known to be engaged in the criminal activities under investigation, except upon a showing that such user's complicity in the criminal activities could not have been discovered before the interception was authorized.

2. Whether, under an order authorizing the interception of communications "of [the person being investigated] and others as yet unknown," conversations on the identified telephone involving a known user of the telephone whose complicity in the offense was not known may be admitted into evidence against such user and against the person named in the order.

STATUTE INVOLVED

18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> * * * * *
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the

particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such of-

fense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

STATEMENT

1. On March 20, 1970, the government submitted an application for an order authorizing the interception of communications over certain telephones pursuant to the provisions of 18 U.S.C. 2510–2520 (Title III, Omnibus Crime Control and Safe Streets Act of 1968). The affidavit accompanying the application submitted to the issuing judge contained extensive, detailed information from three reliable sources engaged in gambling activities indicating that Irving Kahn was a bookmaker operating from his residence

and using his home telephone to conduct his business (A. 10–11, 14–16). This information was corroborated by telephone company records showing calls to and from a known gambling figure in another state (A. 12–15, 17–18).[1] The affidavit also noted that all of the informants had stated that they would refuse to testify, that telephone records are insufficient to convict, and that physical surveillance and seizure of any records of Irving Kahn would be unlikely to furnish useful evidence (A. 18–19). The application therefore concluded that "normal investigative procedures reasonably appear to be unlikely to succeed" (A. 4).

Based on this application, Judge William J. Campbell, of the United States District Court for the Northern District of Illinois, entered an order pursuant to 18 U.S.C. 2518 authorizing the interception of wire communications (A. 21–23). Judge Campbell made the specific findings required by 18 U.S.C. 2518 (3), including the following findings (A. 22):

> (c) [N]ormal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.
>
> (d) [T]here is probable cause to believe that the two telephones, both located at 9126 Four Winds Way, Skokie, Illinois, a private residence, and subscribed to by Irving Kahn, and

[1] On the basis of this information the application stated (A. 5):

"* * * there is probable cause to believe that telephone numbers 675-9125 and 675-9126, located at 9126 Four Winds Way, Skokie, Ill., a private residence and subscribed to by Irving Kahn, have been used and are being used by Irving Kahn and unknown others, in connection with the commission of the above-described [gambling] offenses."

> carrying telephone numbers 675–9125 and 675–9126, respectively, have been and are being used by Irving Kahn and others as yet unknown in connection with the commission of the above described offenses [use of interstate telephone communications facilities for the transmission of bets and betting information and in aid of a racketeering enterprise in violation of 18 U.S.C. 1084 and 1952, and conspiracy to commit such offenses in violation of 18 U.S.C. 371].

The order authorized special agents of the F.B.I. to (A. 22–23):

> [I]ntercept wire communications of Irving Kahn and others as yet unknown concerning the above described offenses to and from two telephones, subscribed to by Irving Kahn, both located at 9126 Four Winds Way, Skokie, Illinois, a private residence, and carrying telephone numbers 675–9125 and 675–9126, respectively.

The order further provided that status reports were to be filed with the issuing judge on the fifth and tenth days following the date of the order, showing what progress had been made toward achievement of the objective of the order and describing the need for continued interception. Irving Kahn's wife Minnie was not mentioned in the application or in the resulting order.

The first status report, filed with Judge Campbell on March 25, 1970 (A. 26–28), indicated that the interception had been terminated because the objective had been attained. It gave a summary of the information obtained from the interceptions, stating in part that on March 21 Irving Kahn made two telephone calls from Arizona to his wife in Chicago and

discussed gambling wins and losses. On the same date, Mrs. Kahn made two telephone calls from the intercepted telephones to a known gambling figure and discussed numbers and amounts of bets placed and the identification, by code, of the bettors.

2. Both Irving and Minnie Kahn were subsequently charged with using a facility in interstate commerce to promote, manage, and facilitate an illegal gambling business in violation of 18 U.S.C. 1952 (A. 29). The government notified them that it intended to introduce in evidence telephone conversations which had been intercepted pursuant to the court order. The Kahns filed motions to suppress the intercepted conversations (A. 30, 31–38). After a hearing, the district court entered an order suppressing any intercepted conversations between Irving and Minnie Kahn as being within the "marital privilege." In addition, all other conversations in which Minnie Kahn participated were also suppressed as being outside of the scope of Judge Campbell's order (Pet. App. C).

The government appealed, and on October 31, 1972, a divided panel of the court of appeals affirmed that part of the district court's order suppressing all conversations of Minnie Kahn but reversed that part of the order based on marital privilege (Pet. App. A).[2]

The majority, in an opinion by Judge Kiley, held that, under the district court's order, there were two require-

[2] Judge Knoch concurred in the result but would also have held the marital privilege applicable. The dissenting judge agreed that the marital privilege was inapplicable but disagreed with the holding that the conversations of Mrs. Kahn were not within the scope of the order of interception; he would have reversed the suppression order.

ments which all intercepted conversations had to satisfy before they could be admitted into evidence (Pet. App. A, p. 9a):

> 1) [T]hat Irving Kahn be a party to the conversations, and 2) that his conversations intercepted be with "others as yet unknown."

The majority then construed the statutory requirements of 18 U.S.C. 2518(1)(b)(iv) and 2518(4)(a) for identification of the person, if known, whose communications are to be intercepted to exclude from the term "others as yet unknown" used in the order any "persons whom careful investigation by the government would disclose were probably using the Kahn telephones in conversations for illegal activities" (Pet. App. A, p. 10a). The majority concluded (*id.* at 12a):

> * * * the government has not shown that had it conducted its investigation with the care Congress intended to protect personal privacy, it would not have discovered whether or not Minnie Kahn had implicated herself by her conversations.

The majority further stated that in view of the failure of the government to discover Mrs. Kahn's complicity in the gambling activities or to justify not instituting an investigation into her possible complicity by the time of the application, "the subsequent wiretaps amounted to a virtual general warrant in violation of her Fourth Amendment right". Therefore, the court concluded, no conversations in which she was involved could be admitted into evidence against either Mr. or Mrs. Kahn.

Judge Stevens, in dissent, pointed out that the inter-

cept order in this case authorized interception over the two specified telephones of "communications *of* Irving Kahn and others as yet unknown" and was thus not limited to conversations *between* Kahn and others (*id.* at 16a). He further characterized as inconsistent with the statutory scheme the majority's interpretation of the "if known" language of Section 2518(1)(b)(iv) and Section 2518(4)(a) to include persons who were not in fact "known" to be involved in the criminal enterprise but whom further investigation would have disclosed were probably using the specified telephones for illegal conversations. He also pointed out that "there is nothing in the record to support an inference that the government should have known that Minnie Kahn * * * would use Irving's telephones to transmit gambling information to a third party while he was out of town". (Pet. App. A, pp. 18a–19a). Finally, 2518(3)(c)) had been met, and that the majority had confused that requirement with the identification requirements of Sections 2518(1)(b)(iv) and 2518(4)(a) (Pet. App. A, pp. 19a–20a).[3]

SUMMARY OF ARGUMENT

While the opinion of the court of appeals is not clear, it appears to have based the suppression of all conversations involving Mrs. Kahn on the wording

[3] Respondents petitioned for a writ of certiorari to review that part of the decision below that held that conversations between them were not covered by a marital privilege. The government opposed that petition, and the Court denied certiorari on May 14, 1973, No. 72–1194.

Judge Stevens said that the requirement of exhaustion of normal investigative techniques in advance of application for the wire interception order (Section

of the district court's order authorizing the interception of conversations on the Kahns' household telephone, rather than on the statute itself. However, the opinion also suggests that this conclusion was fortified by the court's view of the statutory requirements and the underlying congressional policies. Viewed either as an interpretation of the order or of the statute, the suppression of the conversations of Mrs. Kahn regarding the Kahns' criminal enterprise was incorrect.

The clear purport of the statute, derived both from its express language and by implication from its structure, is that the application for the order and the order itself need not identify any persons who are not actually known to be engaged in the criminal enterprise. The statute does not expressly require that all known users of the telephone to be intercepted be identified in the authorization order, nor does it require the investigation of such users and the identification of any known user whose complicity in the offense may be discoverable, and it is not desirable to read any such requirement into the statute. Although the court of appeals believed that requiring such investigations would protect against unwarranted invasions of personal privacy, such a requirement would not in fact benefit the subject of the investigation, since, regardless of the outcome of the investigation, the individual conversations could properly be intercepted even under the rationale of the court of appeals. In contrast, reliance upon the means provided in the statute for avoiding unnecessary

intrusions into personal privacy—the minimization of interceptions of innocent conversations—does afford some protection to the privacy of users of the telephone without pointlessly impeding effective law enforcement.

The description of the conversations to be intercepted contained in Judge Campbell's order authorizing the interception is in language identical to that in the application; there is nothing in either the order or the application to suggest that the district judge intended to restrict the authorization more narrowly than the statute requires.

The construction of the order and the statute adopted by the court of appeals was not justified by any need to avoid constitutional problems. The provisions of the statute were designed specifically to comply with the standards for constitutionally valid electronic surveillance identified by this Court in *Berger* v. *New York,* 388 U.S. 41, and *Katz* v. *United States,* 389 U.S. 347. (See S. Rep. No. 1097, 90th Cong., 2d Sess., p. 102.) The Fourth Amendment's requirement of particularity in the warrant was satisfied by the identification, as required by the statute, of the place to be searched (the telephones in the Kahn residence) and the things to be seized (the conversations relating to the described gambling offenses). In addition, the issuing judge found probable cause for issuance of the warrant. The Fourth Amendment does not require that the warrant identify, nor show probable cause with respect to, every known occupant of an area to be searched. Neither does it prohibit the seizure of

things of the kind identified in the warrant which belong to such occupants.

Since the order authorized the interception of conversations of Irving Kahn and of persons unknown relating to the described gambling activities, and since the complicity of Mrs. Kahn was unknown at the time the order issued, the interception of her incriminating conversations was authorized by the order. These conversations should not have been suppressed. Certainly, even if these conversations could not properly be used against Mrs. Kahn, they were admissible against Mr. Kahn, whose interests were in no way injured by the failure to investigate Mrs. Kahn and to name her in the order.

ARGUMENT

INTERCEPTION OF THE CONVERSATIONS OF MRS. KAHN PURSUANT TO COURT AUTHORIZATION OF SURVEILLANCE OF THE KAHNS' TELEPHONES TO OBTAIN EVIDENCE RELATING TO AN ILLEGAL GAMBLING OPERATION WAS LAWFUL.

A. THE LANGUAGE AND STRUCTURE OF THE STATUTE SHOW THAT ONLY PERSONS ACTUALLY KNOWN TO BE ENGAGED IN THE CRIMINAL ENTERPRISE UNDER INVESTIGATION NEED BE NAMED IN THE INTERCEPT APPLICATION AND AUTHORIZATION

The court order authorizing the interception in this case referred to conversations of Irving Kahn and "others as yet unknown." Recognizing the propriety of intercepting conversations of "unknown" persons, the court of appeals began its analysis by seeking to determine whether Mrs. Kahn was "unknown" within the meaning of the order (*i.e.*, since the order was predicated on the statute, whether she fell in the category

of "known" persons as the term is there used). The court posited two respects in which a person could be "known"—either as a user of the telephone or as a participant in the criminal enterprise (Pet. App. A, p. 9a). It is undisputed that the investigating law enforcement officials knew Mrs. Kahn was a user of the phone but did not know, prior to overhearing her conversations, of her complicity in the gambling operation.

Without squarely answering the question it had thus posed, the court of appeals concluded that known users of the phone should be subjected to thorough criminal investigation in an effort to ascertain whether they might in fact be implicated in the criminal activities, and that failure to do so rendered the interception of their conversations unlawful. Thus, the court resolved the question to the extent of rejecting the government's position that persons not actually known to be criminally implicated simply need not, under the statute or the order, be named.

1. Analysis of the statute, however, demonstrates the correctness of the government's interpretation. Section 2518(1) sets out the requirements for the information to be included in the application for an order authorizing interception of wire communications. The sole requirement relating to the identification of persons whose communications are to be intercepted is contained in Subsection (b)(iv) of that section, which provides that the application should include "the identity of the person, if known, *committing the offense* and whose communications are to be intercepted" (emphasis supplied). Manifestly, the identification require-

ment imposed by Congress relates to knowledge of probable criminal complicity rather than simply knowledge of use of the subject telephone,[4] and the fact that the government knew that Mrs. Kahn and the two Kahn children were users of the phone is of no relevance.[5] Indeed, the statute requires the identification of a person only "if known." Thus, when there is probable cause to believe that a particular telephone is used to commit the offense but no particular person is identifiable, a wire interception order may properly issue. Persons then identified through the surveillance may be prosecuted and the intercepted conversations used in evidence against them. *A fortiori*, when it is known that the telephone and one named person are involved in the commission of the offense, intercepted conversations of previously unsuspected persons may be used against them.

If Congress had intended that the conversations of known users of the telephone could not be intercepted

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[4] The other provision dealing directly with identification of persons is Section 2518(4)(a), which provides that the order authorizing the interception shall specify "the identity of the person, if known, whose communications are to be intercepted." There is no reason to believe that any different meaning was intended by the omission of the phrase "committing the offense" from this provision; indeed, since the application is the only source of the information contained in the order, Congress could not have intended to impose a broader identification requirement in connection with the latter.

[5] The knowledge that Mrs. Kahn and the children were using the target telephones would not have justified including them in the order without probable cause showing that they were also involved in the criminal activities. See *United States* v. *Tortorello*, No. 72-1957, C.A. 2, decided April 5, 1973, petition for writ of certiorari pending, No. 72-1703.

unless they were named in the order, that limitation could easily have been included in the statute. No such provision was included.[6] Instead, Congress protected the rights of innocent users of the target telephones by providing that interception of conversations not relating to the defined offense be minimized (18 U.S.C. 2518(5)). Thus, the limitation was drawn on the basis of the types of conversations to be intercepted, rather than of the participants in the conversations. The overhearing of innocent conversations, including those of a named user against whom the interception is directed, was to be minimized, but no limitation was placed on the interception of conversations relating to the offense under investigation, even though the participants had not been named in the order.[7]

There is no allegation here that there was a failure to minimize; neither respondent has been injured by

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[6] In fact, Congress failed to adopt an amendment which would have provided that only the conversations of those named in the order could be admitted into evidence (Amendment 735, 114 Cong. Rec. 14718). *A fortiori*, it must have been contemplated that conversations of others could lawfully be overheard.

[7] Since the limitation was drawn in terms of the content of the conversations, it was necessary to provide explicitly that conversations involving crimes other than those identified in the order could be used in evidence (18 U.S.C. 2517(5)). But since there was no limitation based on the participants in the conversation, no such explicit savings provision was necessary concerning the illicit conversations of unnamed users. Indeed, were it necessary to reach the question, Section 2517(5) itself would seem specifically to authorize interception and use of Mrs. Kahn's conversations regardless of the wording of the authorization order, since the conversations in question in fact related to offenses other than Mr. Kahn's gambling enterprise—*i.e.*, her violations of the same statutes (18 U.S.C. 1084 and 1952).

the overhearing of innocent conversation. Therefore, no rights protected by the statute have been violated. Since the complicity of Mrs. Kahn was in fact unknown at the time the application for the order was filed, she was not identified in the order. She was instead a "person unknown", whose conversations concerning the described offense were intercepted under the clear terms of the order. Nothing in the statute prohibited this interception.

2. In effect, the court of appeals read the statutory requirement that the order disclose the "identity of the person, if known, whose communications are to be intercepted" (Section 2518(4)(a)) as if it included all known users of the phone who might have been discovered to be implicated in the offense by a more thorough investigation—*i.e.*, as though the statute read "the identity of all persons known or discoverable."[8] There is no basis for such a reading of the statute, which was carefully drafted by Congress to conform to the constitutional criteria illuminated by the Court in *Berger* v. *New York*, 388 U.S. 41, and *Katz* v. *United States*, 389 U.S. 347. These criteria, while emphasizing the need for particularity in de-

[8] Even if the court of appeals' interpretation were correct, there has been no finding by the district court that Mrs. Kahn's complicity should have been known. This issue was not considered in the district court, and the government has had no opportunity to refute the court of appeals' speculation that the informants relied upon in the affidavit or the gambling figures whose names were revealed by the telephone records might have supplied information about Mrs. Kahn's involvement. Accordingly, in order to be consistent with its own reading of the statute, the court of appeals should at most have remanded the case to the district court for consideration whether the government investigation was reasonable under the circumstances.

scribing the offense under investigation and the location of the search (*i.e.*, the telephones to be intercepted), and stressing the importance of limiting the extent and duration of the interception in accordance with the needs of the investigation, contains no requirement of investigation beyond that necessary to establish probable cause and supply the information mandated by the statute.[9]

Thus, in the context of a conventional search, if there is probable cause to believe that one occupant of an area to be searched is engaged in criminal activity and that specifically described evidence is likely to be found there, a warrant can be obtained under which the premises may be searched and property constituting contraband or evidence of a crime seized; ownership of the property is irrelevant. It has never been held that all known occupants of the premises to be searched must be investigated before the warrant may issue, or that property seized in a properly authorized search may not be used in evidence against those it implicates if they were not named in the warrant or independently investigated.[10] Similarly here, probable cause was shown to believe that the described gambling offenses were being committed by Irving Kahn and that interception of his phones would disclose evidence of such offenses, including the identity of other persons involved therein. A proper order authorizing the search

[9] Thus, while identity of the persons to be overheard need be supplied only "if known," recitation of the other information required by Section 2518(1)(b) to be contained in the application for an order authorizing interception of communications is mandatory.

[10] See discussion at pp. 27–30, *infra*.

of the described phone for evidence of the described offense issued, and the valid interception of that phone disclosed the conversations implicating Mrs. Kahn. This conforms entirely to the requirements imposed by Congress.

3. The court of appeals believed that the statute specifically supported its conclusion that the government must identify all known users whose complicity it allegedly should have known. In particular, it relied upon the requirement of Section 2518(3)(c) for a judicial finding that normal investigative procedures are insufficient (Pet. App. A, p. 12a). That requirement, however, is designed to assure that interception of communications is not resorted to in situations in which traditional investigative techniques would be adequate to uncover and prove the criminal activity. It is not at all concerned, once the necessity for an interception has been shown, with the scope of the investigation of others who may be involved. The investigation of other persons to determine their possible complicity simply has no bearing on the question whether there is a sufficient showing that adequate evidence of the illegal activity cannot be gathered without the interception.[11] Therefore, the requirement of Section 2518(3)(c) is unrelated to the

[11] Here, the application recited the refusal of the informants to testify, the insufficiency of the telephone records to establish guilt, and the probable fruitlessness of a search for gambling records (A. 18–19). This was ample basis for the finding in the order (A. 22) that normal investigative techniques appeared unlikely to succeed.

requirement that known users of the target phone for illicit purposes be identified, and it cannot be transmuted into a requirement for investigation of other persons (whose complicity also could not be established without the interception of communications).[12]

In sum, neither the statute nor conventional search and seizure law supports a reading of the requirement that other persons committing the offense be identified "if known" to include the identification of all users of the phone who allegedly should have been known to be committing the offense.

4. Finally, the court of appeals indicated in dictum that even if, contrary to its conclusion, a complete investigation of Mrs. Kahn would not have disclosed her complicity, and she was therefore a "person unknown" under the terms of that order, evidence of her incriminating conversations might not be useable against her (Pet. App. A, p. 13a).[13] This conclusion was also incorrect. The statute contains no such exclusionary rule. On the contrary, it clearly contemplates that incriminating conversations will be used

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[12] As Judge Stevens, dissenting on this aspect of the case, quite rightly pointed out (Pet App. A, p. 20a):

"Although § 2518(3)(c) imposes a duty on the government to exhaust normal investigative procedures before applying for an intercept order, it seems unlikely that the 'if known' requirement in § 2518(4)(a) was intended to impose either an additional exhaustion requirement or a more severe standard for measuring the government's compliance with the express language of subsection (3)(c). I am therefore persuaded that the majority's interpretation of the 'if known' requirement will merely tend to confuse two quite different statutory purposes."

[13] The court did recognize that in such circumstances—which, we submit, were the ones actually before the court—the evidence could be used against Mr. Kahn.

in evidence against persons not named in the order. Thus, Section 2517(3) provides that all conversations are admissible in evidence if they were "intercepted in accordance with the provisions of this chapter." Section 2518(8)(d) directs the issuing judge to determine when the interests of justice require the service of an inventory identifying the communications of parties not named in the order that have been intercepted.[14] In addition, Section 2510(11) defines an "aggrieved person" (who may move to suppress the contents of an intercepted conversation under Section 2518(10)(a)) as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." These provisions indicate that the statute contemplates that all incriminating conversations over the described phone may be intercepted and used in evidence, subject to the right of participants in those conversations, whether named in the order or not, to appropriate notice and an opportunity to challenge the use of the evidence on the grounds particularly specified.[15] The provisions would make no sense what-

[14] In successfully urging adoption of an amendment to the post-intercept notice requirement, Senator Hart pointed out (114 Cong. Rec. 14485):

"This title requires notice of wiretapping or eavesdropping to be served only on the persons named in the court order. The communications of many other persons, innocent or otherwise, may also be intercepted. The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted communications even though such parties are not specifically named in the court order."

[15] This approach is consistent with the "plain view doctrine", discussed *infra* at 29–30, which permits the seizure of incriminating items not particularly described in a search warrant when they are come upon in the course of a lawful search.

ever if Congress intended the exclusionary rule envisioned by the court of appeals.

Suppression of logically relevant evidence in a criminal prosecution is a drastic remedy, which is justified only when it serves an overriding public policy, such as the need to deter illegal official conduct violating substantial rights. See *Nardone* v. *United States*, 308 U.S. 338, 340. But there was no illegal official activity here, and consequently there is no public policy justifying application of an exclusionary rule. The incriminating evidence was discovered in the course of a properly authorized interception of the Kahn telephones; no rights of either Mr. or Mrs. Kahn were violated by the overhearing of their conversations which (1) related to the offenses described in the order and (2) were conducted on the target telephones. An ample showing of probable cause was made to justify the intrusion into the Kahns' privacy, and the interception was conducted in conformity with the court's authorization. No valid deterrent objective could be served by application of an exclusionary rule in such circumstances precluding the use of intercepted conversations against persons not named in the order.

B. THE DECISION OF THE COURT OF APPEALS WOULD NOT RESULT IN PROTECTION OF THE PRIVACY OF CITIZENS AS TO WHOM PARTICIPATION IN CRIMINAL ACTIVITIES IS NOT ESTABLISHED AT THE TIME OF APPLICATION FOR AN INTERCEPT AUTHORIZATION

Invoking congressional concern to safeguard the privacy of innocent persons, the court of appeals concluded that it was necessary to limit "tightly" the class of persons "as yet unknown" (whose conversations could be intercepted under the authorization) and to

interpret the statute to require the government to name all "persons whom careful investigation by the government would disclose were probably using the Kahn telephones in conversations for illegal activities" (Pet. App. A, p. 10a). We believe, however, that a meaningful concern for the dual objectives of the statute (protecting the privacy of innocent persons while enhancing the effectiveness of law enforcement in certain areas in which interception of communications is indispensible) mandates precisely the opposite result, since the investigation required by the court of appeals, whatever its outcome, would not prevent interception of the telephone user's conversations.

Let us consider the question first from the standpoint of the salutary proposition that unnecessary governmental intrusions into the personal privacy of innocent persons should be minimized. What the court of appeals has required is a thorough criminal investigation of all known users of telephone lines that are the subject of an application for an intercept order—in this case, an investigation of Mrs. Kahn and the two teenage Kahn children.[19] Such an investigation, while undoubtedly lawful, could hardly further the privacy interests of those subject to it, unless it prevents some other, more substantial governmental involvement in their affairs.

However, in the present case, the subjects of these additional criminal investigations required by the court of appeals would not derive any such benefits therefrom. If the investigation yields evidence of their complicity, their conversations would unquestionably be subject to valid search and seizure under the court of appeals

[19] If a target telephone were in a store or an office, everyone who had ready access to it might have to be investigated.

opinion, simply by naming them in the application and order. If, on the other hand, the investigation failed to disclose evidence of criminal involvement, the individual would then become "unknown" within the order, and the interception of his or her conversations would be similarly validated. In either case the investigation could not lead to any avoidance of interception of the person's conversations.

Accordingly, whether or not the investigation that the court of appeals would require is conducted, any user of a phone subject to an otherwise valid interception order is left with the protection that Congress itself provided to avoid needless intrusions on personal privacy—the minimization requirement of Section 2518(5) applicable to innocent conversations (a requirement that applies to any named targets of the investigation as well as to other users and that is not alleged to have been violated in this case).

Not only does the approach of the court of appeals result in a pointless and unnecessary criminal investigation of citizens who are not known to be participants in the criminal enterprise, but it places serious obstacles—wholly unnecessary for the protection of individual rights—in the way of proper law enforcement activities. In the instant case, a careful investigation of Mr. Kahn's activities had disclosed reliable information that his home telephones were being used in connection with the conduct of an unlawful gambling enterprise (including use of interstate telephone facilities in violation of federal law). In accordance with the carefully drawn requirements of the statute, a full account of the investigation was submitted to a district judge (A.

9–20), who concluded that probable cause was shown to justify issuance of an order authorizing the wire interception. The order, containing time limitations on the interception and other provisions for judicial supervision of its execution, was duly issued. This was clearly sufficient under the statute to justify the interception of conversations over the identified telephone lines.

The imposition of a judicial requirement for further investigation of other users of the telephone—not needed to justify the fundamental intrusion entailed in placing the tap on the phone—diverts law enforcement resources and, in fast-breaking cases, may cause a fatal delay in obtaining intercept authority. It also places law enforcement officers in the dilemma of having to predict what a court may subsequently say about various questions not necessarily having clear and readily ascertainable answers—*e.g.*: What individuals come within the category of "users" of the phone, who must therefore be subject to investigation? How much investigation is sufficient? If there is some suggestion of possible complicity of such an individual, is it proper to name him as a target in the application (running the risk that a court will later hold that there was not probable cause justifying his inclusion), or should his name be omitted (running the risk that the second guess will lead to the opposite conclusion)?

While there may be circumstances in which it is useful or necessary to engage in judicial second-guessing in the evaluation of police conduct, surely it is not desirable in cases such as this, where the intrusion is independently justified under the law and is conducted

in accordance with a most thorough system of judicial supervision at the initial authorization stage and thereafter.

C. THE ORDER AUTHORIZING THE INTERCEPTION IN THIS CASE DID NOT RESTRICT THE INTERCEPTION MORE NARROWLY THAN REQUIRED BY THE STATUTE

Judge Campbell's order authorized the interception of "communications of Irving Kahn and others as yet unknown concerning the above-described offenses to and from two telephones, subscribed to by Irving Kahn" (A. 22). The court of appeals interpreted this language to limit the interceptions to conversations (1) to which Irving Kahn was a party and (2) in which he conversed with "others as yet unknown" (Pet. App. A, p .9a.) [17] Both limitations are incorrect. There is no indication that the issuing judge either intended to, or in fact did, limit the scope of the order more narrowly than required by the statute. Indeed, it is evident that the reference to "others as yet unknown" in the operative section of the order is carried over from the finding of probable cause (A. 21), which is, in turn, derived from the statement in the application (A. 4). All these references are clearly intended to reflect the statutory requirement that persons whose illicit communications are to be intercepted be identified "if known." Thus, there is no more reason to find that the order intended to preclude the interception of Mrs.

[17] Other courts have not interpreted similar language in other orders so narrowly. See *United States* v. *Fiorella*, 468 F.2d 688 (C.A. 2), pending on petition for writ of certiorari, No. 72-863; *United States* v. *Cox*, 462 F.2d 1293 (C.A. 8), pending on petition for writ of certiorari, No. 72-5278; *United States* v. *Cox*, 449 F.2d 679 (C.A. 10), certiorari denied, 406 U.S. 934.

Kahn's conversations, simply because she was a known user of the target telephones, than there is to conclude that the statute requires that result.

It is equally evident, as the dissenting judge noted, that the reference to the "communications of Irving Kahn and others" should not be read as if it referred to conversations *between* Irving Kahn and others (Pet. App. A, pp. 16a–17a). The affidavit disclosed that Irving Kahn regularly used his residence telephones to conduct his illegal gambling business. One of the stated purposes of the interception, contained in Judge Campbell's order itself, was to "reveal the identities of [Irving Kahn's] confederates, their places of operation, and the nature of the conspiracy involved therein" (A. 23). Against this backdrop, it is hard to discern any intent to limit interception to conversations of Irving Kahn himself.[18] Indeed, since Irving Kahn could not communicate except with others, the words "and others" would have been unnecessary unless they referred to communications by others.

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[18] It was obviously likely that other users of the Kahn household telephones might participate in conversations that, whether known or unknown to them, could provide revealing information about the gambling operation. Since Mr. Kahn could hardly be assumed to be invariably at home and available, someone else would be expected on occasion to receive calls relating to the business on those telephones. In any event, conversations which might disclose the identity of other conspirators in the gambling business or other pertinent information might very well occur when someone other than Mr. Kahn was using the telephone. For example, a gambling associate might identify himself by name

D. REFERENCE TO THE GENERAL BODY OF CONSTITUTIONAL PRINCIPLES GOVERNING SEARCHES AND SEIZURES SUPPORTS THE POSITION OF THE GOVERNMENT, NOT THAT OF THE COURT OF APPEALS

Without making it clear whether it was holding that the interception of conversations of unnamed persons, although clearly authorized as a general matter by the statute, is unconstitutional, the court of appeals stated that the failure to investigate Mrs. Kahn's possible complicity in her husband's illegal gambling enterprise made "the subsequent wiretaps * * * a virtual general warrant in violation of her Fourth Amendment right" (Pet. App. A, p. 12a).[19] The court cited no authority for the proposition that a court authorization to intercept communications is a general warrant if it fails to name the persons whose conversations will be overheard, and in fact, so far

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if he wished to leave a message. Under these circumstances, it is unlikely that the judge intended to limit the order to conversations in which Irving Kahn himself participated. Instead, the words used in the order should be given their normal meaning and read as authorizing the interception of conversations both of Irving Kahn and of others, provided they concerned criminal offenses.

[19] Presumably the court did not mean to say that the wiretaps themselves were a general warrant, but that the order, insofar as it was construed to authorize the interception of conversations to which Mrs. Kahn was a party (or perhaps any conversations to which Mr. Kahn was not a party as well), would become an unconstitutional general warrant. The court did not indicate whether it would find the same defect with respect to conversations involving persons "unknown" even under its definition, although it is difficult to see how the "general warrant" analysis could be confined to the conversations of Mrs. Kahn.

as we are aware, all other courts that have considered this question have reached a contrary conclusion. See *United States* v. *Fiorella*, 468 F.2d 688, 691 (C.A. 2), petition for certiorari pending, No. 72–863, and cases there cited.[20]

That we have here no "general warrant" problem is evident from an examination of the language in the Fourth Amendment prohibiting such warrants: "* * * [N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The two elements of particularity required by the Fourth Amendment are both fully satisfied by the authorization in this case, which identified both the "place to be searched" (the two telephone lines) and the "things to be seized" (conversations relating to an illegal gambling enterprise). Identification of the person or persons whose conversations are to be overheard is not a constitutional requirement.

The error in the court of appeals' approach may be seen by examination of an analogous conventional

[20] See also *United States* v. *Cox*, 449 F.2d. 679, 685–687 (C.A. 10), certiorari denied, 406 U.S. 934; *United States* v. *Cox*, 462 F.2d 1293, 1300–1301 (C.A. 8), petition for certiorari pending, No. 72–5278. In the Tenth Circuit's *Cox* decision, communications in which neither of the parties to the conversation was specifically named in the order were introduced into evidence. The court of appeals upheld the admissibility of those conversations, even though they concerned an offense other than the one specified in the order. In the Eighth Circuit's *Cox* case, the court held (correctly, we submit) that interception of all communications over the designated telephone during the authorized period was proper.

search and seizure. Suppose a warrant had been issued, upon a showing of probable cause, to search the Kahn residence for records of the illegal gambling operation, and the search had produced records in Mrs. Kahn's handwriting. The search and seizure would surely have been fully lawful even had she not been named in the warrant nor independently investigated. Indeed, so long as the place to be searched and the property to be seized had been identified with sufficient particularity and an adequate showing of probable cause underlay the warrant application, the warrant would be constitutionally unimpeachable even if no person against whom the search was directed was named (a problem we do not have here, where Mr. Kahn was specifically identified). See, *e.g.*, *Hanger* v. *United States*, 398 F. 2d 91, 99 (C.A. 8), certiorari denied, 393 U.S. 1119; *Miller* v. *Sigler*, 353 F. 2d 424, 428 (C.A. 8), certiorari denied, 384 U.S. 980; *Dixon* v. *United States*, 211 F. 2d 547, 549 (C.A. 5).

Even were there some principle that the interception of conversations must initially be directed at persons actually named in the intercept authorization, the "plain view" exception to the warrant requirement would justify seizure and use of Mrs. Kahn's conversations under the circumstances of this case. As explained in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465, the "plain view" doctrine applies to "the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character," which is precisely what happened here. It

is justified by the consideration that (*id.* at 467), "* * * given the [lawfulness of] the initial intrusion, the seizure of an object in plain view * * * does not convert the search into a general or exploratory one."[21]

E. EVEN IF THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE AUTHORIZATION WAS DEFECTIVE IN FAILING TO NAME MRS. KAHN, HER CONVERSATIONS SHOULD NOT HAVE BEEN SUPPRESSED FOR USE AGAINST MR. KAHN

Both the district court (Pet. App. C, p. 23a) and the court of appeals (Pet. App. A, p. 14a) apparently suppressed the conversations of Mrs. Kahn completely, without discriminating between the propriety of their use against her and of their use against Mr. Kahn. Even assuming that the court of appeals was correct that the government was not authorized to intercept her conversations, it should have limited the suppression to use against Mrs. Kahn. It is undisputed that the interception of Mr. Kahn's conversations relating to his gambling operation was fully justified under the statute and the intercept authorization. The defect found by the court of appeals related to a matter that was wholly personal to Mrs. Kahn—her right to be

[21] The opinion in *Coolidge* also requires that the evidence be come across inadvertently (403 U.S. at 469–471). While this might raise a problem had Mrs. Kahn's criminal complicity been known in advance and had it been planned to seize her conversations, that was not the case here.

subjected to a criminal investigation before her conversations were intercepted. Since no rights of Mr. Kahn were in any way violated, he should not be accorded standing to seek suppression of the conversations for use against him.

It is true that Section 2518(10)(a) permits any "aggrieved person" to move to suppress the contents of a communication intercepted in violation of the authorization order, and Section 2510(11) defines an "aggrieved person" to include "a person against whom the interception was directed." These provisions should not, however, be construed to confer broad standing upon persons to press grievances that are uniquely personal to others, when the manifest purpose of the provisions is simply to confer standing upon the target of an interception to raise general objections regarding the manner in which an interception authorization was procured or executed.[22]

[22] The point can be readily understood by means of an analogy to a conventional search and seizure situation. If officers having a valid warrant for the arrest of Mr. Kahn had entered his house lawfully to execute the warrant, but while doing so had unlawfully arrested Mrs. Kahn, searched her, and discovered evidence incriminating both, such evidence would be admissible against him, notwithstanding the fact that the unlawful conduct took place inside his house, since the illegality would not relate to the entry into the premises, but to the violation of a right entirely personal to her.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed to the extent that it affirmed the suppression of conversations over the target phone concerning the offenses described in the order.

Respectfully submitted.

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UNITED STATES OF AMERICA,

Petitioner,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IRVING KAHN AND MINNIE KAHN

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BRIEF FOR RESPONDENTS IRVING KAHN AND MINNIE KAHN

STATEMENT OF THE CASE

The respondents accept petitioner's statement.

SUMMARY OF ARGUMENT

Any invasion of one's security must be clearly and unequivocally authorized by the courts in conformance with the Constitution or the laws of the United States. The government's argument demonstrates that the intrusion on Minnie Kahn's conversations lacks any authorization.

Any authorization to intrude upon privacy affords only of rigorously confined interpretation. The government's argument depends upon the order of authorization including intrusion it does expressly exclude, and expanding the order to encompass whatever the statute does not expressly forbid, to the end that the enforcement officer may interpret his authority in a manner most amenable to his convenience.

The submission of the government that the protection of the right of security extends only to the innocent subverts and erodes the concept of liberty, and ignores the constant admonitions of this court against popular ends justifying illegal means.

The propriety of an intrusion is judged at its inception, not by an evaluation of the fruits.

A precise warrant circumscribes the ambit of the intrusion. Exceeding the express bounds is never justified by expediency, nor what the magistrate may have intended. Because the officer exceeded and interpreted, the Court of Appeals rightly ruled the authorization was executed as though it were a constitutionally impermissible general warrant.

Further, when the law requires the exhaustion of "normal investigative procedures" or apprehension of danger in pursuing them, the prerequisite is not satisfied by the conclusionary statement that such procedures will not avail. This is true as a basic tenet. It is doubly true when it becomes eminently apparent that no "normal investigative procedures", in respect to Minnie Kahn, were instituted. Since the prerequisite of overhearing her was ignored, no authorization to listen to her conversations could

possibly have issued. It follows that the expansion of the issued order as a warrant to intrude upon her conversations could not possibly have been within the intended scope.

Alternatively, if "normal investigative methods" were used, and developed no basis upon which to employ the extraordinary investigative method of eavesdropping, no authorization to overhear her conversation could reasonably have been sought. The authorization order, therefore, cannot be expanded to imply that which it could not legally include.

Additionally, all of the government's authorities, so far as they are applicable, support the decision of the Court of Appeals, here being reviewed.

As an addendum, we respectfully submit that the continuing secrecy surrounding the issuance of interception files makes incomplete, or at the least, piecemeal consideration on review, and, thus, reduces its effectiveness. We see no advantage it serves, nor how it advances orderly comprehensive proceedings.

ARGUMENT

THE INTERCEPTION OF THE TELEPHONE CONVERSATIONS OF MINNIE KOHN WAS WITHOUT AUTHORITY.

A. The government argument evidences no such clear authorization as the law demands.

The thrust of the government's case addresses itself to the Court of Appeals establishing two requirements:

1. That Irving Kahn be a party to the conversations, and

2. That his conversations be with "others as yet unknown."

It argues that the statute requiring the order state the "identity of the person, if known, whose conversations are to be intercepted" (18 U.S.C. 2518(4) (a) does not mean the person must be unknown, but means a person is unknown to be in the proscribed enterprise.

It argues that, though the order does not warrant the listening to all conversation made by anyone on the named phones, the statute does not make such limitation, and if the limitation had been intended, it could easily have been included in the statute, but was not.

It further resists the requirements established by the Court below because (p. 24, its Brief):

> The imposition of a judicial requirement for further investigation of other users of the telephone—not needed to justify the fundamental intrusion entailed in placing the tap on the phone—diverts law enforce-

ment resources and, in fast-breaking cases, may cause a fatal delay in obtaining intercept authority. It also places law enforcement officers in the dilemma of having to predict what a court may subsequently say about various questions not necessarily having clear and readily ascertainable answers—*e.g.*: What individuals come within the category of "users" of the phone, who must therefore be subject to investigation? How much investigation is sufficient? If there is some suggestion of possible complicity of such an individual, is it proper to name him as a target in the application (running the risk that a court will later hold that there was not probable cause justifying his inclusion), or should his name be omitted (running the risk that the second guess will lead to the opposite conclusion)?

Generally, we submit, the government's argument is disjointed and tortured. We have endeavored to bring it into some form of plausible coherency, but there are some aspects of the argument that defy such effort. There are some statements that are just beyond our ken, our powers of interpretation, and our ability to divine. They may be commented on hereinafter but they, frankly, are not understood. They are:

The second paragraph on page 10:

> "Although the court of appeals believed that requiring such investigations [or known users of the phones] would protect against unwarranted invasions of personal privacy, such a requirement would not in fact benefit the subject of the investigation, since, regardless of the outcome of the investigation, the individual conversations could properly be intercepted even under the rationale of the court of appeals."

The first paragraph on page 22:

> "Let us consider the question first from the standpoint of the salutary proposition that unnecessary governmental intrusions into the personal privacy of in-

> nocent persons should be minimized. What the court of appeals has required is a thorough criminal investigation of all known users of telephone lines that are the subject of an application for an intercept order—in this case, an investigation of Mrs. Kahn and the two teenage Kahn children. Such an investigation, while undoubtedly lawful, could hardly further the privacy interests of those subject to it, unless it prevents some other, more substantial governmental involvement in their affairs."

and the last paragraph on page 22 going through the first full paragraph on page 23:

> "However, in the present case, the subjects of these additional criminal investigations required by the court of appeals would not derive any such benefits therefrom. If the investigation yields evidence of their complicity, their conversations would unquestionably be subject to valid search and seizure under the court of appeals opinion, simply by naming them in the application and order. If, on the other hand, the investigation failed to disclose evidence of criminal involvement, the individual would then become "unknown" within the order, and the interception of his or her conversations would be similarly validated. In either case the investigation could not lead to any avoidance of interception of the person's conversations."

We do not state the foregoing as any form of disrespect to, or criticism of, our esteemed opponent. We may, in fact, be admitting to our own obtuseness. We do not believe so. But we do point out these examples as illustrative of an untenable position.

This plea of the petitioner to reverse the Courts below relies upon the propriety of a very singular invasion of privacy. This invasion, made under statute at the behest

of the Executive, was to be used with circumspection, and only in the clearest of cases. It would then seem that, to be allowed, the authority therefor should be in the clearest of terms.

Proposing, as the United States must, that this intrusion comes within the authorization of the severely limited statute, the authorization should be clear. We think that the fact that the argument is muddled is the proof that the authorization was not clearly given.

B. Authorized intrusions on privacy are to be strictly construed; are restricted to the clear authority of the order, and what is not expressly authorized is forbidden.

The Government throughout its argument makes reference to the Fourth Amendment. We are not dealing with any Fourth Amendment question here. The Fourth Amendment wouldn't allow phone interception of any kind. Respectfully, we think this authorized interception statute must eventually be found by this Court to be unconstitutional. Dealing, however, as unfortunately we must at this juncture, with the judicial endorsement of this statute, we shall temporarily accept the theory that it is consonant with our Constitution. Accepting, for the nonce, that this is a legal diminishment of the Fourth Amendment, for diminishment it is, we make the following submission to this Court: (1) Any such diminishment is to be closely, not loosely, interpreted. Thus when the Government says, "No valid deterrent objective could be served by application of an exclusionary rule in such circumstances precluding the use of intercepted conversations against persons

not named in the order" (Page 21, Government's Brief), we suggest that the valid deterrent objective is preservation of what is left of the Fourth Amendment. (2) We do not think any intrusion upon privacy is "wholly unnecessary for the protection of individual rights" (Page 23, Government's Brief). It is inconceivable to us that a curtailment of an admitted invasion of individual rights can be deemed wholly unnecessary for their protection. (3) We do not think that the diverting of law enforcement resources (Page 24, Its Brief) is a valid argument here.[1] It was intended that law enforcement resources be extended to their utmost, the conviction of crimes should not be easy. This court made that clear in *United States* v. *DiRe*, 332 U.S. 581, where it said at p. 595:

> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."

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[1] The latter part of the argument of the Government is a great deal of sympathetic appeal, such as: "fast-breaking"; "diversion of law enforcement"; "fatal delays," (p 24, its brief) all the exception in the usually tedious business of law enforcement. There is nothing "fast-breaking" where an F.B.I. agent sits and listens to people's telephone conversations for five entire days, whatever they concern. Remembering, also, that the indictment conversation occurred on the 21st, and no intercept order of Minnie's conversations was ever even sought, the interception nonetheless continued through the 24th.

In this regard, the Government's argument seems to be that the law enforcement officer is not to look to the order of authority, but rather he should carry around the statute book and use his own interpretation as to how far the statute—not the authorization order—allows him to go. Of course, they err.

> "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted." *McDonald* v. *United States,* 335 U.S. 451, 455-6.

Ultimately, in regard to the Fourth Amendment, the Government argues that "Identification of the person or persons whose conversations are to be overheard is not a constitutional requirement." (Page 28 Government's Brief) Neither the Constitution, nor the Fourth Amendment anticipated this intrusion. This intrusion is a deviation from the Fourth Amendment, an erosion of the Fourth Amendment, to which erosion we understand the Executive is not averse. This type of statement is not even spurious. The Constitution talked about intrusion upon a person's person, household, or effects. Nothing in the Constitution talks about his conversations.

Recognizing, as we must, that the Fourth Amendment does not validate wiretapping, only the statute validates wiretapping. Recognizing, as we must, that this intrusion upon Fourth Amendment established rights has but one permissible standard, and that is the Fourth Amendment as limited by the statute, retaining as much of the Fourth

Amendment as is possible under the circumstances,[2] we must also recognize that the Fourth Amendment—even with the incroachment—has as its object the protection of the individual, the following arguments of the Government are senseless:

> **"Although the Court of Appeals believed that requiring such investigations would protect against unwarranted invasions of personal privacy, such a requirement would not in fact *benefit the subject of the investigation*, since, regardless of the outcome of the investigation, the individual conversations could properly be intercepted even under the rationale of the court of appeals." (Page 10, Its Brief)**

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[2] We believed it had been surely recognized by this Court that the Constitution conferred the right to be let alone, the right of privacy. *United States* v. *Lefkowitz*, 285 U.S. 452, 464. However, in *Katz* (389 U.S. 347 at 352) this Court apparently holds that the general right to privacy is the main concern of the individual states. This case leaves us with confusion as to how that concern is to be gratified in federal cases, especially as it relates to privilege. Illinois is conscientious in that concern:

Chapter 38, Sect. 155-1 Ill. Rev. Stats. provides in part:

> "In all criminal cases, husband and wife may testify for or against each other: provided, that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during coverture, except in cases where either is charged with an offense against the person or property of the other, or in case of wife abandonment, or where the interests of their child or children are directly involved, or as to matters in which either has acted as agent of the other."

Title 18 U.S.C. §2517(4) gives but lip service to the State's concern:

> No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."

But where are these concerns vindicated?

Even if we could understand the import of such a statement we do know that the necessary implication is that the subject of the investigation is regarded as the interest of government to be served, as against the limitation of intrusion or invasion of personal privacy. With such an approach, we do not wonder that personal liberties and privileges outlined by the Constitution are deemed a matter of no consequence, and thus an affront to all liberty-respecting persons.

The Government takes the approach that unless the "order" of the authorization explicitly rejects the intrusion, then the intrusion is allowed. Thus it argues: "there is nothing in either the order or the application to suggest that the District Judge intended to restrict the authorization more narrowly than the statute requires." (Government's Brief, pg. 11)

In accordance with the Government's approach that what is not precluded by the order is included in the order—contrary to every Fourth Amendment concept—is its statement that: "[T]here is no more reason to find that the order intended to preclude the interception of Mrs. Kahn's conversations, simply because she was a known user of the target telephones, than there is to conclude that the statute requires that result." (Pgs. 25-26, Its Brief)

The approach is contrary to all our principals of intrusion upon privacy, or other constitutionally endowed rights. Only that which is expressly authorized is tenable. What is not expressly authorized is forbidden.

C. In evaluating rights, no distinction is made between the innocent and the culpable.

Permeating the Government's entire argument is a tacit concept that wholesale eavesdropping, once an intrusion has been authorized, is the norm, because once the intrusion is authorized innocent conversations will never be made

the subject of criminal charges. Therefore, according to the Government's reasoning, the innocent are not offended, and criminality wherever and however found is the "subject of the investigation" and it would "pointlessly impede" effective law enforcement if the intruder were not allowed to listen to everything to determine for himself whether it was innocent or culpable. Thus the Government does not speak of the minimization of interception of conversations—it speaks only of "the minimization of *innocent* conversations". Intrusion then is not to be limited if the conversation has possible culpability. The Court will note how often the term is used in the brief: "The minimization of *innocent* conversations" (Page 11, Its Brief); "Congress protected the right of *innocent* users of the target telephone" (Page 15, Its Brief); "Overhearing of *innocent* conversations all to be minimized" (Page 15 Its Brief) "Neither respondent has been injured by the overhearing of *innocent* conversation." (Page 16, Its Brief)

What the Government does not say, but what is absolutely implicit in its argument is that no conversation can be deemed innocent until it has been heard, and thus the overhearing cannot be minimized. What the Government also does not say is, if determined to be innocent, there will be no occasion for a motion for suppression. It is patent that you cannot know whether a conversation is innocent or guilty unless you listen indiscriminately, as happened here, and as the Government is urging this Court to endorse.

What the Government also does not recognize is that civil rights were made to protect the guilty as well as the innocent from their being victims of crimes by their Government. As though fearing the concept will be forgotten, this court has repeatedly reminded that this guarantee extends to the innocent and guilty alike. *McDonald* v. *United States*, 335 U.S. 451, 453.

> "The protection of the 4th Amendment extends to all equally—to those justly suspected or accused, as well as to the innocent." *Agnello* v. *United States,* 269 U.S. 20, 32.

Generally, only the accused invoke this constitutional prohibition, and, as Mr. Justice Frankfurter observed, dissenting, "criminals have few friends." *Harris* v. *United States,* 331 U.S. 145, 156.

Thus, the government's preoccupation will stimulate popular appeal, but legally and constitutionally, it must fail.

D. An intrusion is good or bad when it starts, and it does not derive its character from the extent of its success.

The Government's constant arguments about there being a direct analogy here to a Fourth Amendment search of premises is inept, as we discussed before. Several reasons exist for this, not the least of which is that the specific fruits or instrumentalities of crime must be sworn to be in existence in order for a conventional search warrant to issue. There must also be reasonable cause to believe that the instrumentalities or fruits—already in existence—will be found on specified premises. This illustrates, again, the total disinvolvement of the conventional Fourth Amendment search from this type of activity. Search is not being made by eavesdropping for the fruits of a crime nor its instrumentalities already in existence, nor even for evidence of the crime which is already in existence. Searches are here being made for the commission of a future crime.

But these distinctions aside, we invited the Court to examine the Government's argument:

> "Thus, in the context of a conventional search, if there is probable cause to believe that one occupant of

> an area to be searched is engaged in criminal activity and that specifically described evidence is likely to be found there, a warrant can be obtained under which the premises may be searched and property constituting contraband or evidence of a crime seized; ownership of the property is irrelevant." (Page 17, Its Brief)

They are wrong. Ownership of the property is relevant. *United States* v. *Rachel*, 7 Cir. 360 F.2d 858, 860.

The Government argument continues:

> "[I]t cannot be transmuted into a requirement for investigation of other persons (whose complicity also could not be established without the interception of communications)." (Page 19, Its Brief)

If we are going to relate the electronic intrusion to a search, this type of intrusion is definitely forbidden. This demonstrates the search for crime prior to any reason to believe that a crime has been, or is about to be, committed. This is the age-old prohibition against search before arrest; search before charge. This is the age-old prohibition against the fruits of the search justifying the search itself.

> "We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States* v. *DiRe*, 332 U.S. 581, 595, citing *Byars* v. *United States*, 273 U.S. 28 as one of the frequent occasions.

Finally, at Page 31, the Government, by its footnote 22 attempts to elucidate its position by an analogy to the conventional search and seizure situation and states:

> "If officers having a valid warrant for the arrest of Mr. Kahn had entered his house lawfully to execute the warrant, but while doing so had unlawfully ar-

> rested Mrs. Kahn, searched her, and discovered evidence incriminating both, such evidence would be admissible against him, notwithstanding the fact that the unlawful conduct took place inside his house, since the illegality would not relate to the entry into the premises, but to the violation of a right entirely personal to her."

It is conceivable that a more inept analogy could have been made, but we are unaware how. Especially is this true in the light of this Court's decision in *United States* v. *DiRe*, 332 U.S. 581, where this Court remarked at 587:

> "The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had been issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?"

But again, even aside from the same Government having heretofore disavowed such a consideration, we submit to the Court that if there were a search conducted purportedly incident to the arrest of Mr. Kahn in the hypothetical situation set forth by the Government, and that search incident to arrest extended beyond permissible bounds, Mr. Kahn

had all the standing in the world to contest it. What the Government does not seem to recognize is that the purported authority of search incident to arrest—even if overextended—continues to be the purported authority, and Mr. Kahn has every right in the hypothetical situation to move to suppress the overextended search because the authority for the search was personal to him.

The Government seems to think that a wholesale invasion of the home at which the telephones were installed was perfectly compatible with the right of privacy. Thus it argues:

> "An ample showing of probable cause was made to justify the intrusion into the Kahns' privacy, and the interception was conducted in conformity with the court's authorization." (Government's Brief, Page 21)
>
> • • •
>
> "Since Mr. Kahn could hardly be assumed to be invariably at home and available someone else would be expected on occasion to receive calls relating to the business on those telephones." (Government's Brief, Page 26, Fn. 18)

This argument runs head-long into established authority, and cannot prevail.

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. *True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home.* Such constitutional limitations arise from grievances, real or fancied,

> which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." *United States* v. *Kirschenblatt,* 2 Cir., 16 F.2d 202, 203. (our emphasis)

Cited with approval by this court, *U.S.* v. *Lefkowitz,* 285 U.S. 452, 464.

But let us assume that the government rationalizations were presented to the trial judge. Let us assume that the trial judge was informed that now that he had been given what he considered probable cause for believing that Irving Kahn was conducting an interstate gambling business, the Government had said "since you have given us this order we think this justifies our listening to any conversation on the telephone even though there are four known occupants of that house," and what if they had further said "we know Irving isn't going to be on the premises all of the time, so you obviously expect us to listen to any conversation by any one of the four known occupants or otherwise." If issued, it seems quite obvious to us that the authorization would have been illegal.

> "To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Stanley* v. *Georgia,* 394 U.S. 557, 572 (Black, J. concurring)

We cannot allow the Constitutional barrier that protects the privacy of the individual to be hurdled so easily. *McDonald* v. *United States,* 335 U.S. 451, 455.

The principle is illustrated by two Seventh Circuit cases, *United States* v. *Foust*, 461 F.2d 328, and *United States* v. *Dichiarinte*, 445 F.2d 126, analogizing a consent entry to the authorization here. In *Foust* a policeman working as a guard in a school cafeteria saw the defendant and knew he was not a student. The guard's suspicion was also aroused because "an envelope commonly used to transport government checks" was protruding from the defendant's coat pocket. 461 F.2d at 329. Determining that the person the defendant was allegedly there to visit was not registered as a student, the guard ordered him to empty his pockets. The defendant produced identification with one name, gave the officer another as his own, and had a government check payable to a third person. Because the guard "had to examine the envelope in order to ascertain its contents," the court characterized his actions as "the classical type of prying into hidden places which constitutes a search. . . ." *Id*, at 330. Since a warrant had not been obtained, the search was unconstitutional.

In *Foust* there was no issue concerning the initial intrusion by the guard—the questioning of the defendant. *Dichiarinte* involved a similar initial undertaking, the search of a home with the defendant's consent. As in *Foust*, however, the search finally exceeded allowable bounds when the agents, who had been invited to search for narcotics, commenced an unrelated search and found documents that led to the defendant's indictment for income tax violations. The court stated:

> "A consent search is reasonable only if kept within the bounds of the actual consent. Honig v. United States, 208 F.2d 916, 919 (8th Cir. 1953). . . . In the case before us the defendant's consent set the parameters of the agents' conduct at that which would

reasonably be necessary to determine whether he had narcotics in his home. But the agents went beyond what was necessary to determine whether defendant had hidden narcotics among his personal papers; they read through those papers to determine whether they gave any hint that defendant was engaged in criminal activity. This was a greater intrusion into defendant's privacy than he had authorized and the fourth amendment requires that any evidence resulting from this invasion be suppressed."[4]

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[4] The fact that the defendant submitted to a degree of intrusion upon his privacy by permitting the agents to enter his home and rummage through his personal property does not mean that the much greater intrusion on his privacy resulting from government agents' reading his personal papers must automatically be allowed. *See* Chimel v. California, 395 U.S. 752, 766-767 n. 12, 89 S.Ct. 2034, 23 L. Ed.2d 685 (1969), (461 F.2d at 29-30.)

These cases reject the principle that once obtaining possession lawfully, there is no constitutional limit on examination, just as this Court rejected the same principle in *Chimel* v. *California*, 395 U.S. 752, and *Terry* v. *Ohio*, 392 U.S. 1.

It is in the spirit of this unfortunate further espousal of this rejected principle that the Government argues:

> "In the instant case, a careful investigation of Mr. Kahn's activities had disclosed reliable information that his home telephones were being used in connection with the conduct of an unlawful gambling enterprise." (Page 23, Government's Brief)

Thus, the full scope of the Government's tortured argument manifests itself. A careful investigation of Mr. Kahn's activities did not disclose that his home telephones were

being used. It disclosed that he was so using them. A telephone is of itself a faultless thing. It is the person who makes the faultless thing an "instrumentality of crime", and it is people, not places and things, that the Fourth Amendment protects. *Katz* v. *United States,* 389 U.S. 347, 351.

The initial justification for the wiretap authorization was the activities of Irving Kahn, not Minnie—nor their two children.

It is firmly established that a search can only remain allowable if each part of the procedure is reasonably related in scope to the justification for its initiation. *Terry* v. *Ohio,* 392 U.S. 1, 30; *Sibron* v. *New York,* 392 U.S. 40, 67.

It is pertinent to remind that "The genius of our liberties holds in abhorence all irregular inroads upon the dwelling houses and persons of the citizen, . . ." *Luther* v. *Borden et al,* 7 How (48 U.S.) 1, 66.

2. The congressional requirement that normal investigative methods be used or be demonstrated to be implausible is not a mere formality.

The Government says at Page 5 of its Brief that "The Affidavit also noted that all of the informants had stated that they would refuse to testify, . . ." About this, we could only refer the prosecution to the fact that the grant of immunity was obviously not entertained. This much used, and abused, device is apparently not applicable to Government informers who are favored, allowed to continue their alleged illegal business, and who constitute the anonymous foundations for the Government's affidavits to secure orders permitting invasion of privacy, which, but for this statute, would be outlawed by the Fourth Amendment.

The Government continues, "[T]hat physical surveillance and seizure of any records of Irving Kahn would be unlikely to furnish useful evidence." (Page 5, its Brief) Those who have served time for the violation of the now defunct Title 26, U.S.C. §4411 and §4412 would be amazed to find that the surveillance of them and the seizure of their records produced "useless" evidence.

Continuing, in apparent approbation of the dissent of Judge Stevens in this case, the Government indicates that Judge Stevens, "Also pointed out that 'there is nothing in the record to support an inference that the Government should have known that Minnie Kahn * * * would use Irving's telephones to transmit gambling information to a third person while he [Irving] was out of town." (Page 9, Its Brief)

We consider this an utterly and completely misleading statement. The Government, with any kind of investigation, "should have known that Minnie Kahn would use Irving's telephones" since she lived in the house maintaining the telephones, and that Minnie used "Irving's" (if a house phone could be called that of the father of the house) telephone, whether he was in town or out of town. When she used that phone—with the Government's knowledge that she would use that phone—the Government knew it had no right to listen, because their "normal investigative efforts" had divulged no information about Minnie Kahn being any kind of a lawbreaker.

The Government also says that—and we have some trouble with this labored reasoning—that a thorough investigation that the statute required before using this unusual invasion of privacy would in fact be an invasion of privacy stating:

> "What the court of appeals has required is a thorough criminal investigation of all known users of telephone lines that are the subject of an application for an intercept order—in this case, an investigation of Mrs. Kahn and the two teenage Kahn children. Such an investigation, while undoubtedly lawful, could hardly further the privacy interests of those subject to it, unless it prevents some other, more substantial governmental involvement in their affairs." (Government's Brief, Pg. 22)

What we think they are trying to say is that the normal investigative procedures required by the statute (18 U.S.C. §2518(3) (c)), i.e. surveillance, would offend the privacy of the person known to be using the phones, whereas a surreptitious invasion of the "uninvited ear" (*Katz* v. *United States,* 389 U.S. at 352, 353) is less offensive. Surveillance is a normal investigative procedure. How, then, with the admission that the surveillance was not employed, is it possible the Government advances to this Court the finding of the District Court that "(c) Normal investigative procedures reasonably appear unlikely to succeed and are too dangerous to be used" (p. 5, Its Brief)? How, on an admission that the normal investigative procedures have not been used, is an endorsement of such a finding advanced? What was "too dangerous" about a normal surveillance of Irving Kahn, Minnie Kahn and two school age children?

The confusion of the Government's Brief becomes readily apparent when it engages in some of its hypothetical postulants. At Page 5 of its Brief, it is indicated that "seizure of any records of Irving Kahn would be unlikely to furnish useful evidence." At Page 29 it suggests to this Court: "Suppose a warrant had been issued, upon a showing of probable cause, to search the Kahn residence for records of the illegal gambling operation, and the search had produced records in Mrs. Kahn's handwriting."

Is this Court to believe that what could not happen on one hand, makes a basis for argument on the other hand?

The Court will note that the Government makes quite a point of the fact that Judge Stevens said the requirements of exhaustion of normal investigative techniques in advance of application for the wire interception order under §2518(3)(c) had been met. (Government Brief, Page 9) That can hardly stand in the face of the acknowledgement that normal investigative techniques had not even started, much less have they been exhausted.

The Government demeans the decision of the Court of Appeals, (Page 16, Its Brief) where it says:

> "[T]he court of appeals read the statutory requirement that the order disclose the 'identity of the person, if known, whose communications are to be intercepted' (Section 2518(4)(a) as if it included all known users of the phone who might have been discovered to be implicated in the offense by a more thorough investigation—i.e., as though the statute read 'the identity of all persons known or discoverable.' "

We submit to the Court that "known" overcomes "discoverable". "Known" is known. The Court of Appeals said that if normal investigative procedures would have discovered an activity, then that person was known. The Government further demeans the Court of Appeals decision when it says at Page 16:

> "Even if the Court of Appeals' interpretation were correct, there has been no finding by the district court that Mrs. Kahn's complicity should have been known."

It uses this as rather the touchstone of its erratic argument. But the statute (Title 18, USC, Section 2518(1)(b) (iv)) requires the inclusion of "the identity of the person . . . committing the offense."

It continues to argue: "[W]hen there is probable cause to believe that a particular telephone is used to commit the offense but no particular person is identifiable, a wire interception order may properly issue." (Page 14, Its Brief) We know no authority for such a statement, but here certainly the argument isn't applicable. They did know a particular person. That person was identified.

Thus in *Katz* (389 U.S. 347) this Court made a special observation that any persons other than Katz were not listened to. Here Irving Kahn was identifiable. He is in the position of Katz, and Minnie Kahn is in the position of those other persons using that public phone, whose conversations were not intruded upon.

3. The authorities submitted all militate in favor of affirming the decision on review.

We think the authorities advanced by the Government in support of its position are inapplicable or support the respondents' position. Discussion of those authorities follows:

We do not see that *United States* v. *Fiorella,* 2 Cir., 468 F.2d 688, is in any way applicable to this case. It merely stands for the proposition that "and others yet unknown" in the authorization order does not, of itself, constitute a general warrant. The case does, however, repeat the proposition that the order, under 18 U.S.C. §2518(4)(a), requires the naming of the person, if known, whose communications are to be intercepted. (468 F.2d at 691)

United States v. *Cox,* 10 Cir., 449 F.2d 679 concerned only whether knowledge of a bank robbery, obtained under an authorized wire-tap to determine violation of the narcotics laws, could legally be used. It is of no assistance

here since the court found itself "at liberty to presume that all of the proceedings followed were in accordance with the statutes since the defendant does not find fault with these occurrences." This case found only that 18 U.S.C. §2517(5) was not unconstitutional on its face.

The government advances—obviously as its most heartening authority—that *United States* v. *Cox*, 8 Cir., 462 F. 2d 1293 stands for the proposition that "interception of all communications over the designated telephone during the designated period was proper." (p. 28, fn 20, Its Brief) It is our interpretation of the case that it does approve indiscriminate overhearing on the shabbiest of pretexts (see 462 F.2d at 1300-1). And its theory has a complement—totally inacceptable:

> "If appellants, and the unindicted persons whose conversations were overheard, have any remedy under Title III other than the suppression of conversations outside the warrant's scope, it lies in § 2520 as a civil suit against the investigating officers alleging that they exceeded their authority." (462 F.2d at 1301-2)

The reasoning of the 8th Circuit eludes us. It says just prior to this that only innocent statements are suppressable. Further, it does not enlighten us on the forum where unindicted co-conspirators should seek suppression. What we think the Court is saying is that suppression of culpable, or even evidentiary statements, is ruled out, and that only a civil remedy exists. Congress has not said that, even though it has expressly provided a *civil* remedy under Title III, it is exclusive. Even were we to make the wholly unnecessary inference which the Eighth Circuit implies, that Circuit runs head-long into this Court's decision in *Trupiano* v. *United States*, 334 U.S. 699, which

stands for the proposition that the Fourth Amendment bars the use of evidence outside the warrant's scope, be it innocent or culpable.

In *Katz* v. *United States,* 389 U.S. 347, the agents confined their surveillance to the brief periods during which Katz used the telephone booth, and for the purpose of establishing Katz's unlawful telephone communications. (389 U.S. at 254). In the same case, the government also urged that a magistrate would have issued an authorization if it had been informed among other things "of the precise intrusion it would entail." (389 U.S. at 354). This court tacitly agreed, but condemned the omission of this necessary step.

Berger v. *United States,* 388 U.S. 41 speaks with derogation of an order used as a "passkey to further search." (388 U.S. at 57). It also condemns the "roving commission" to seize any and all conversations (388 U.S. at 59) but more, it condemned exactly what the government urges this court to endorse, the absence of particular description of "the 'property' sought, the conversations, . . ." (388 U.S. at 59)

Coolidge v. *New Hampshire,* 403 U.S. 443, so heavily relied on by the government, makes concisely the point that we here have taken these many pages to do. The government urges the analogy of the "plain view" concept. *Coolidge* makes it clear the government's analogy must fail. *Coolidge* spells out the two limitations on the doctrine: 1. Plain view *alone* is never enough to justify the warrantless seizure of evidence; and, 2. The discovery of evidence in plain view must be inadvertent (403 U.S. at 469). Both limitations fail here.

4. Criminal defendants are disadvantaged by arbitrarily continuing suppression of court files.

In respect of the report made to the District Court Judge who issued the interception order, the government states:

> "The first status report, filed with Judge Campbell on March 25, 1970 (A. 26-28), indicated that the interception had been terminated because the objective had been attained. It gave a summary of the information obtained from the interceptions, stating in part that on March 21 Irving Kahn made two telephone calls from Arizona to his wife in Chicago and discussed gambling wins and losses. On the same date, Mrs. Kahn made two telephone calls from the intercepted telephones to a known gambling figure and discussed numbers and amounts of bets placed and the identification, by code, of the bettors." (Pages 6 and 7 its Brief)

This report is found at A. 26-28. The Court will notice that this was suppressed. This report made no part of the record in either of the Courts below.

This is the first time respondents or their counsel have had any information of what was reported to the district court judge authorizing the order. The file, itself (U.S. Dist. Ct. N.D. Ill., E.D. No. 70 C 673) continues to be unavailable to the respondents, except to the extent that the government's interests dictate divulgence.[3] We can

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[3] Neither the file nor the docket are attainable through regular processes in the office of the clerk of the court. Neither do we know if the application for his interception order was properly authorized by the congressionally designated executive.

appreciate an initial desirability for secrecy, but certainly none exists at this time, except to frustrate comprehensive exploration.

Thus is demonstrated the soundness of the observation of Mr. Justice Frankfurter, in his concurring decision in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." (341 U.S. at 170).

With this unwarranted secrecy, the respondents are left to speculate about basic questions, like whether Minnie Kahn had the notice served on her, as required by 18 U.S.C. §2519, the determination of which question could, of itself, resolve this case against the government.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the decision of the United States Court of Appeals, insofar as it suppressed the intercepted phone conversations of Minnie Kahn, should be affirmed.

Respectfully submitted,

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Attorneys for Respondents.

No. 72-1328

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

IRVING KAHN AND MINNIE KAHN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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We deem it appropriate to make a short reply in light of certain comments in respondents' brief which suggest that respondents were somehow improperly denied access to relevant information concerning the wire interception (Br. 27-28). We note at the outset that respondents do not contend that their charge of "arbitrarily continuing suppression of court files" (Br. 27) has any bearing on the proper resolution of the legal issues before this Court.

Respondents are correct in stating that they did not have access to the government's interim status report to the issuing judge, dated March 25, 1970. Respondents did, however, have access to the complete tape recordings of the interception. By order of March 10, 1971, the district court exercised its discretion under 18 U.S.C.

2518(8)(d) to make all of the recordings available.[1] In addition, respondents were furnished with copies of the wire interception application, affidavit and order; moreover, the inventory notice served on respondent Irving Kahn by delivery to respondent Minnie Kahn included a copy of the judge's order directing service of the inventory.[2] They thus had complete access to all material relevant to the validity of the wire interception. Indeed, since they had access to the tapes themselves, they had significantly more information than is required by the statute.

The interim report itself is irrelevant to any issue concerning the wire interception here.[3] The report did no more than summarize the government attorney's interpretation of the intercepted conversations. There is no statutory or other requirement for disclosure of such reports.[4] In light of the availability of the complete

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[1] The docket entries contained in the Appendix (pp. 1-2) are the extracts from the complete docket contained in the Appendix in the court of appeals. They do not include the March 10 order, which, we are advised by the office of the United States Attorney, is also entered in the district court's docket.

[2] On March 30, 1971, the district court extended the time for filing pre-trial motions to and including May 1, 1971 (App. 1). Respondents thus had ample opportunity after the material was available to them to file any motions. The motion to suppress was filed April 27, 1971.

[3] The report was included in the Appendix solely because it contained a convenient summary of the intercepted conversations (App. 26-28).

[4] The judge who issues the interception order determines whether to require interim reports. 18 U.S.C. 2518(6). If required, they may be in any form, including oral. See *United States* v. *LaGorga*, 336 F. Supp. 190, 194 (W.D. Pa.). The sufficiency of these reports is solely a matter for the issuing and supervising judge. *United States* v. *Ianelli*, 477 F. 2d 999 (C.A. 3), petition for certiorari pending, No. 73-64.

tape recordings and the fact that the interception had already terminated when the first and only report was filed, it is inconceivable that respondents could have been prejudiced in any way by their lack of access to this report.

Respondents claim that they do not have sufficient information to challenge the validity of the authorization to apply for the interception order (Br. 27, n. 3), and that they cannot determine whether notice was served on Mrs. Kahn "as required by 18 U.S.C. 2519" (Br. 28).[5] These claims are incorrect. Since they received copies of the wire interception application, affidavit, and order, they had all of the information available to similarly situated defendants who have raised the authorization issue in other cases. Also, all of the information which could be necessary to determine the sufficiency of the inventory notice was provided by the recordings, the copy of the order authorizing the interception, and the order directing service of inventory notice pursuant to 18 U.S.C. 2518(8)(d).

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[5] Section 2519 concerns post-intercept reports required to be filed by the issuing judge and the Department of Justice with the Administrative Office of the United States Courts. We presume respondents intended to refer to the inventory notice requirement of 18 U.S.C. 2518(8)(d), which directs the service of an inventory (advising that the interception was authorized, and giving the dates on which it occurred), on the persons named in the order that authorized the interception and on such other parties to intercepted conversations as the judge determines appropriate. In this case, the inventory was served on Mr. Kahn by a copy of the order directing service of the inventory on him, which contained all the information required by Section 2518(8)(d). The judge did not direct service of the inventory on Mrs. Kahn and she was not served, but she accepted the inventory served on Mr. Kahn on his behalf and obviously had full actual notice of the contents of the inventory.

Respondents' claim that, because of the government's "unwarranted secrecy," they "are left to speculate about basic questions" (Br. 28) is thus demonstrably incorrect. There was full and complete disclosure of all relevant material, well beyond the minimum required by the statute.[6]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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[6] We note in addition only that *United States* v. *Rachel*, 360 F. 2d 858 (C.A. 7), cited by respondents (Br. 14) as indicating that ownership of property disclosed during an authorized search is relevant, was apparently based instead upon the theory that the improper arrest of the owner of the seized contraband tainted the subsequent search. In *Clifton* v. *United States*, 224 F. 2d 329 (C.A. 4), the court held that property seized during a search incident to a valid arrest may be used against the owner of the property, even though he was not present at the time of the arrest. See also *Drummond* v. *United States*, 350 F. 2d 983 (C.A. 8).

Syllabus

UNITED STATES v. KAHN ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72-1328. Argued December 11-12, 1973—
Decided February 20, 1974

On the Government's application for an order authorizing a wiretap interception of the home telephones of respondent Irving Kahn, a suspected bookmaker, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the District Judge entered an order pursuant to 18 U. S. C. § 2518, which described the telephones to be tapped and found probable cause to believe that Mr. Kahn and "others as yet unknown" were using the telephones to conduct an illegal gambling business, and authorized FBI agents to intercept wire communications "of" Mr. Kahn and "others as yet unknown." The agents intercepted incriminating calls made by Mr. Kahn in Arizona to respondent Mrs. Kahn at their home in Chicago, and also incriminating calls made by Mrs. Kahn to "a known gambling figure." The respondents were subsequently indicted for violating the Travel Act. Upon being notified of the Government's intention to introduce the intercepted conversations at trial, respondents moved to suppress them. The District Court granted the motion. The Court of Appeals affirmed, construing the requirements of 18 U. S. C. §§ 2518 (1) (b) (iv) and 2518 (4) (a) that the person whose communications are to be intercepted is to be identified if known, as excluding from the term "others as yet unknown" any persons who careful Government investigation would disclose were probably using the telephones for illegal activities, and that since the Government had not shown that further investigation of Mr. Kahn's activities would not have implicated his wife in the gambling business, she was not a "person as yet unknown" within the purview of the wiretap order. *Held:*

1. Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wiretap is sought, and since it is undisputed here that the Government had no reason to suspect Mrs. Kahn of complicity in the gambling business before the wiretapping

began, it follows that under the statute she was among the class of persons "as yet unknown" covered by the wiretap order. Pp. 151–155.

2. Neither the language of the wiretap order nor that of Title III requires the suppression of legally intercepted conversations to which Mr. Kahn was not himself a party. Pp. 155–158.

471 F. 2d 191, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 158.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Harriet S. Shapiro,* and *Jerome M. Feit.*

Anna R. Lavin argued the cause for respondents. With her on the brief was *Edward J. Calihan, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

On March 20, 1970, an attorney from the United States Department of Justice submitted an application for an order authorizing a wiretap interception pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520, to Judge William J. Campbell of the United States District Court for the Northern District of Illinois. The affidavit accompanying the application contained information indicating that respondent Irving Kahn was a bookmaker who operated from his residence and used two home telephones to conduct his business.[1] The

[1] The affiant, a special agent of the Federal Bureau of Investigation, provided detailed information about Kahn's alleged gambling activities. This information was derived from the personal observations of three unnamed sources, whose past reliability in gambling

affidavit also noted that the Government's informants had stated that they would refuse to testify against Kahn, that telephone company records alone would be insufficient to support a bookmaking conviction, and that physical surveillance or normal search-and-seizure techniques would be unlikely to produce useful evidence. The application therefore concluded that "normal investigative procedures reasonably appear to be unlikely to succeed," and asked for authorization to intercept wire communications of Irving Kahn and "others as yet unknown" over two named telephone lines, in order that information concerning the gambling offenses might be obtained.

Judge Campbell entered an order, pursuant to 18 U. S. C. § 2518, approving the application.[2] He specifi-

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investigations was described by the affiant. In addition, the information was corroborated by telephone company records showing calls on Kahn's telephones to and from a known gambling figure in another State.

The Government's application and the accompanying affidavit also claimed that one Jake Jacobs was using a telephone at his private residence to conduct an illegal gambling business. The subsequent order of the District Court authorizing wire interceptions also covered Jacobs' phone. Any communications intercepted over the Jacobs telephone, however, play no role in the issues now before us.

[2] Title 18 U. S. C. § 2518 provides, in pertinent part:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

. . . .

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a par-

cally found that there was probable cause to believe that Irving Kahn and "others as yet unknown" were using the two telephones to conduct an illegal gambling

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ticular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

. . . . .

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

business, and that normal investigative techniques were unlikely to succeed in providing federal officials with sufficient evidence to successfully prosecute such crimes. The order authorized special agents of the FBI to "intercept wire communications of Irving Kahn and others as yet unknown" to and from the two named telephones concerning gambling activities.

The authorization order further provided that status reports were to be filed with Judge Campbell on the fifth and 10th days following the date of the order, showing what progress had been made towards achievement of the order's objective, and describing any need for further interceptions.[3] The first such report, filed with Judge Campbell on March 25, 1970, indicated that the wiretap had been terminated because its objectives had been attained. The status report gave a summary of the information garnered by the interceptions, stating in part that on March 21 Irving Kahn made two telephone calls from Arizona to his wife at their home in Chicago and discussed gambling wins and losses, and that on the same date Minnie Kahn, Irving's wife, made two telephone calls from the intercepted telephones to a person described in the status report as "a known gambling figure," with whom she discussed various kinds of betting information.

Both Irving and Minnie Kahn were subsequently indicted for using a facility in interstate commerce to promote, manage, and facilitate an illegal gambling busi-

[3] Title 18 U. S. C. § 2518 (6) provides, in pertinent part:

"Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require."

ness, in violation of 18 U. S. C. § 1952.[4] The Government prosecutor notified the Kahns that he intended to introduce into evidence at trial the conversations intercepted under the court order. The Kahns in turn filed motions to suppress the conversations. These motions were heard by Judge Thomas R. McMillen in the Northern District of Illinois, who, in an unreported opinion, granted the motion to suppress. He viewed any conversations between Irving and Minnie Kahn as within the "marital privilege," and hence inadmissible

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[4] The Travel Act, 18 U. S. C. § 1952, provides:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

"and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102 (6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury."

The indictment in this case stated that the alleged gambling activities attributed to the Kahns were in violation of Ill. Rev. Stat., c. 38, §§ 28-1 (a), (2), and (10).

at trial.[5] In addition, all other conversations in which Minnie Kahn was a participant were suppressed as being outside the scope of Judge Campbell's order, on the ground that Minnie Kahn was not a person "as yet unknown" to the federal authorities at the time of the original application.

The Government filed an interlocutory appeal from the suppression order.[6] A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed that part of the District Court's order suppressing all conversations of Minnie Kahn, but reversed that part of the order based on the marital privilege. 471 F. 2d 191. The court held that under the wiretap order all intercepted conversations had to meet two requirements before they could be admitted into evidence:

> "(1) that Irving Kahn be a party to the conversations, and (2) that his conversations intercepted be with 'others as yet unknown.'" *Id.*, at 195.

The court then construed the statutory requirements of 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a) that the person whose communications are to be intercepted is to be identified if known, as excluding from the term "others as yet unknown" any "persons whom careful investigation by the government would disclose were probably using the Kahn telephones in conversations for illegal activities." *Id.*, at 196. Since the Government in this case had not shown that further investi-

[5] Title 18 U. S. C. § 2517 (4) provides that:

"No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."

[6] Title 18 U. S. C. § 2518 (10)(b) gives the United States the right to take an interlocutory appeal from an order granting a motion to suppress intercepted wire communications. In addition, 18 U. S. C. § 3731 generally provides for appeals by the Government from pretrial orders suppressing evidence.

gation of Irving Kahn's activities would not have implicated Minnie in the gambling business, the Court of Appeals felt that Mrs. Kahn was not a "person as yet unknown" within the purview of Judge Campbell's order.

We granted the Government's petition for certiorari, 411 U. S. 980, in order to resolve a seemingly important issue involving the construction of this relatively new federal statute.[7]

At the outset, it is worth noting what issues are not involved in this case. First, we are not presented with an attack upon the constitutionality of any part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Secondly, review of this interlocutory order does not involve any questions as to the propriety of the Justice Department's internal procedures in authorizing the application for the wiretap.[8] Finally, no argument is presented that the federal agents failed to conduct the wiretap here in such a manner as to minimize the interception of innocent conversations.[9] The question presented is simply whether the conversations that the Government wishes to introduce into evidence at the respondents' trial are made inadmissible by the "others as yet unknown" language of Judge Campbell's order or by the corresponding statutory requirements of Title III.

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[7] The Kahns' cross-petition for certiorari, raising the marital privilege argument, was denied. 411 U. S. 986.

[8] Such issues are currently *sub judice* in *United States* v. *Giordano*, No. 72–1057, and *United States* v. *Chavez*, No. 72–1319.

[9] In relevant part, 18 U. S. C. § 2518 (5) requires that:

"Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ."

In deciding that Minnie Kahn was not a person "as yet unknown" within the meaning of the wiretap order, the Court of Appeals relied heavily on an expressed objective of Congress in the enactment of Title III: the protection of the personal privacy of those engaging in wire communications.[10] In light of this clear congressional concern, the Court of Appeals reasoned, the Government could not lightly claim that a person whose conversations were intercepted was "unknown" within the meaning of Title III. Thus, it was not enough that Mrs. Kahn was not known to be taking part in any illegal gambling business at the time that the Government applied for the wiretap order; in addition, the court held that the Government was required to show that such complicity would not have been discovered had a thorough investigation of Mrs. Kahn been conducted before the wiretap application.

In our view, neither the legislative history nor the specific language of Title III compels this conclusion. To be sure, Congress was concerned with protecting individual privacy when it enacted this statute. But it is also clear that Congress intended to authorize electronic surveillance as a weapon against the operations of organized crime.[11] There is, of course, some tension between these two stated congressional objectives, and the question of how Congress struck the balance in any particular instance cannot be resolved simply through general reference to the statute's expressed concern for the protection of individual privacy. Rather, the starting point, as in all statutory construction, is the precise wording chosen by Congress in enacting Title III.

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[10] See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, Tit. III, §§ 801 (b) and (d), 82 Stat. 211; S. Rep. No. 1097, 90th Cong., 2d Sess., 66.

[11] See *id.*, § 801 (c), 82 Stat. 211; S. Rep. No. 1097, 90th Cong., 2d Sess., 66-76.

Section 2518 (1) of Title 18 U. S. C. sets out in detail the requirements for the information to be included in an application for an order authorizing the interception of wire communications. The sole provision pertaining to the identification of persons whose communications are to be intercepted is contained in § 2518 (1)(b)(iv), which requires that the application state "the identity of the person, if known, *committing the offense* and whose communications are to be intercepted." (Emphasis supplied.) This statutory language would plainly seem to require the naming of a specific person in the wiretap application only when law enforcement officials believe that such an individual is actually committing one of the offenses specified in 18 U. S. C. § 2516. Since it is undisputed here that Minnie Kahn was not known to the Government to be engaging in gambling activities at the time the interception order was sought, the failure to include her name in the application would thus seem to comport with the literal language of § 2518 (1)(b)(iv).

Moreover, there is no reason to conclude that the omission of Minnie Kahn's name from the actual wiretap order was in conflict with any of the provisions of Title III. Section 2518 (4)(a) requires that the order specify "the identity of the person, if known, whose communications are to be intercepted." Since the judge who prepares the order can only be expected to learn of the target individual's identity through reference to the original application, it can hardly be inferred that this statutory language imposes any broader requirement than the identification provisions of § 2518 (1)(b)(iv).

In effect, the Court of Appeals read these provisions of § 2518 as if they required that the application and order identify "all persons, known or discoverable, who are committing the offense and whose communications are to be intercepted." But that is simply not what

the statute says: identification is required only of those "known" to be "committing the offense." Had Congress wished to engraft a separate requirement of "discoverability" onto the provisions of Title III, it surely would have done so in language plainer than that now embodied in § 2518.

Moreover, the Court of Appeals' interpretation of § 2518 would have a broad impact. A requirement that the Government fully investigate the possibility that any likely user of a telephone was engaging in criminal activities before applying for an interception order would greatly subvert the effectiveness of the law enforcement mechanism that Congress constructed. In the case at hand, the Court of Appeals' holding would require the complete investigation, not only of Minnie Kahn, but also of the two teen-aged Kahn children and other frequenters of the Kahn residence before a wiretap order could be applied for. If the telephone were in a store or an office, the Government might well be required to investigate everyone who had access to it—in some cases, literally hundreds of people—even though there was no reason to suspect that any of them were violating any criminal law. It is thus open to considerable doubt that such a requirement would ultimately serve the interests of individual privacy. In any event, the statute as actually drafted contains no intimation of such total investigative demands.[12]

[12] It is true, as the Court of Appeals noted, that 18 U. S. C. §§ 2518 (1)(c) and 2518 (3)(c) require the application to demonstrate, and the judge authorizing any wire interception to find, that "normal investigative procedures" have either failed or appear unlikely to succeed. This language, however, is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. See generally S. Rep. No. 1097, 90th Cong., 2d Sess., 101. Once the necessity for the interception has been shown, §§ 2518 (1)(c) and 2518 (3)(c) do not impose an additional requirement that the Gov-

In arriving at its reading of § 2518, the Court of Appeals seemed to believe that taking the statute at face value would result in a wiretap order amounting to a "virtual general warrant," since the law enforcement authorities would be authorized to intercept communications of anyone who talked on the named telephone line. 471 F. 2d, at 197. But neither the statute nor the wiretap order in this case would allow the federal agents such total unfettered discretion. By its own terms, the wiretap order in this case conferred authority to intercept only communications "concerning the above-described [gambling] offenses." [13] Moreover, in accord with the statute the order required the agents to execute the warrant in such a manner as to minimize the interception of any innocent conversations.[14] And the order limited the length of any possible interception to 15 days, while requiring status reports as to the progress of the wiretap to be submitted to the District Judge every five days, so that any possible abuses might be quickly discovered and halted. Thus, the failure of the order to specify that Mrs. Kahn's conversations might be the subject of interception hardly left the executing agents free to seize at will every communi-

ernment investigate all persons who may be using the subject telephone in order to determine their possible complicity.

[13] Title 18 U. S. C. § 2518 (4)(c) requires that an order authorizing wire interceptions contain:

"a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates."

See also 18 U. S. C. § 2518 (1)(b)(iii), imposing a similar requirement as to the application for a wiretap order.

But cf. 18 U. S. C. § 2517 (5), providing that under certain circumstances intercepted conversations involving crimes other than those identified in the order may be used in evidence.

[14] See n. 9, *supra*.

cation that came over the wire—and there is no indication that such abuses took place in this case.[15]

We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons "as yet unknown" covered by Judge Campbell's order.

The remaining question is whether, under the actual language of Judge Campell's order, only those intercepted conversations to which Irving Kahn himself was

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[15] The fallacy in the Court of Appeals' "general warrant" approach may be illustrated by examination of an analogous conventional search and seizure. If a warrant had been issued, upon a showing of probable cause, to search the Kahn residence for physical records of gambling operations, there could be no question that a subsequent seizure of such records bearing Minnie Kahn's handwriting would be fully lawful, despite the fact that she had not been identified in the warrant or independently investigated. In fact, as long as the property to be seized is described with sufficient specificity, even a warrant failing to name the owner of the premises at which a search is directed, while not the best practice, has been held to pass muster under the Fourth Amendment. See *Hanger* v. *United States*, 398 F. 2d 91, 99 (CA8); *Miller* v. *Sigler*, 353 F. 2d 424, 428 (CA8) (dictum); *Dixon* v. *United States*, 211 F. 2d 547, 549 (CA5); *Carney* v. *United States*, 79 F. 2d 821, 822 (CA6); *United States* v. *Fitzmaurice*, 45 F. 2d 133, 135 (CA2) (L. Hand, J.); Mascolo, Specificity Requirements for Warrants under the Fourth Amendment: Defining the Zone of Privacy, 73 Dick. L. Rev. 1, 21. See also *United States* v. *Fiorella*, 468 F. 2d 688, 691 (CA2) ("The Fourth Amendment requires a warrant to describe only 'the place to be searched, and the persons or things to be seized,' not the persons from whom things will be seized").

a party are admissible in evidence at the Kahns' trial, as the Court of Appeals concluded. The effect of such an interpretation of the wiretap order in this case would be to exclude from evidence the intercepted conversations between Minnie Kahn and the "known gambling figure" concerning betting information. Again, we are unable to read either the District Court order or the underlying provisions of Title III as requiring such a result.

The order signed by Judge Campbell in this case authorized the Government to "intercept wire communications of Irving Kahn and others as yet unknown . . . to and from two telephones, subscribed to by Irving Kahn." The order does not refer to conversations *between* Irving Kahn and others; rather, it describes "communications *of* Irving Kahn and others as yet unknown" to and from the target telephones. To read this language as requiring that Irving Kahn be a party to every intercepted conversation would not only involve a substantial feat of verbal gymnastics, but would also render the phrase "and others as yet unknown" quite redundant, since Kahn perforce could not communicate except with others.

Moreover, the interpretation of the wiretap authorization adopted by the Court of Appeals is at odds with one of the stated purposes of Judge Campbell's order. The District Judge specifically found that the wiretap was needed to "reveal the identities of [Irving Kahn's] confederates, their places of operation, and the nature of the conspiracy involved." It is evident that such information might be revealed in conversations to which Irving Kahn was not a party. For example, a confederate might call in Kahn's absence, and leave either a name, a return telephone number, or an incriminating message. Or, one of Kahn's associates might himself

come to the family home and employ the target telephones to conduct the gambling business.[16] It would be difficult under any circumstances to believe that a District Judge meant such intercepted conversations to be inadmissible at any future trial; given the specific language employed by Judge Campbell in the wiretap order today before us, such a conclusion is simply untenable.

Nothing in Title III requires that, despite the order's language, it must be read to exclude Minnie Kahn's communications. As already noted, 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a) require identification of the person committing the offense only "if known." The clear implication of this language is that when there is probable cause to believe that a particular telephone is being used to commit an offense but no particular person is identifiable, a wire interception order may, nevertheless, properly issue under the statute.[17] It necessarily follows that Congress could not have intended that the authority to intercept must be limited to those conversations *between* a party named in the order and others, since at least in some cases, the order might not name any specific party at all.[18]

[16] By referring to the conversations of Kahn and others "to and from" the two telephones, the order clearly envisioned that the "others" might be either receiving or transmitting gambling information *from* the two Kahn telephones. Yet it could hardly be expected in these instances that Irving Kahn would always be the person on the other end of the line, especially since either bettors or Kahn's confederates in the gambling business might often have occasion to dial the telephone numbers in issue.

[17] Such a situation might obtain if a bettor revealed to law enforcement authorities that he had repeatedly called a certain telephone number in order to place wagers, but had never been told the name of the person at the other end of the line.

[18] In fact, the Senate rejected an amendment to Title III that would have provided that only the conversations of those specifically named

For these reasons, we hold that the Court of Appeals was in error when it interpreted the phrase "others as yet unknown" so as to exclude conversations involving Minnie Kahn from the purview of the wiretap order. We further hold that neither the language of Judge Campbell's order nor that of Title III requires the suppression of legally intercepted conversations to which Irving Kahn was not himself a party.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

As a result of our decision in *Berger* v. *New York*, 388 U. S. 41, a wiretap—long considered to be a special kind of a "search" and "seizure"—was brought under the reach of the Fourth Amendment.[1] The dominant feature of that Amendment was the command that "no Warrants shall issue, but upon probable cause"—a requirement which Congress wrote into 18 U. S. C. § 2518.[2]

in the wiretap order could be admitted into evidence. 114 Cong. Rec. 14718 (1968) (Amendment 735).

[1] Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] Title 18 U. S. C. § 2518 provides in pertinent part:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

By § 2518 (3), the judge issuing the warrant must be satisfied by the facts submitted by the police that there is "probable cause" for belief that "an individual" is committing the described offense, § 2518 (3)(a); that there is "probable cause" for belief that particular communications concerning the offense will be attained by interception, § 2518 (3)(b); that normal investigative procedures have been tried but have failed or reasonably appear to be unlikely to succeed or to be too dangerous, § 2518 (3)(c), and that there is "probable cause" for belief that named facilities are being used or are about to be used in the commission of the named offense, § 2518 (3)(d). The Act goes on to state that the judge must specify "the identity of the person, if known, whose communications are to be intercepted." § 2518 (4)(a).

The judge in the present case described the telephones

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

. . . . . .

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

. . . . . .

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

. . . . . .

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted."

to be tapped and found probable cause to believe "Irving Kahn and others as yet unknown" were connected with the commission of specified interstate crimes. The judicial order authorized special federal agents to "intercept wire communications of Irving Kahn and others as yet unknown" concerning these crimes.

The agents intercepted incriminating calls made by Irving Kahn and also incriminating calls made by his wife, Minnie Kahn. The District Court on motions to suppress disallowed use of the conversations of Minnie Kahn; and the Court of Appeals agreed, saying that the probable-cause order made it necessary for the Government to meet two requirements: (1) "that Irving Kahn be a party to the conversations, and (2) that his conversations intercepted be with 'others as yet unknown,'" 471 F. 2d 191, 195. That seems to be a commonsense interpretation, for Irving Kahn when using a phone talks not to himself but with "others" who at the time were "unknown." To construe the warrant as allowing a search of the conversations of anyone putting in calls on the Kahn telephone amounts, as the Court of Appeals said, "to a virtual general warrant in violation" of Mrs. Kahn's rights, *id.*, at 197.

Whether the search would satisfy the Fourth Amendment is not before us, the decision below being based solely on the Act of Congress. Seizure of the words of Mrs. Kahn is not specified in the warrant. The narrow scope of the search that was authorized was limited to Mr. Kahn and those whom he called or who called him.

Congress in passing the present Act legislated, of course, in light of the general warrant. The general warrant historically included a license to search for everything in a named place as well as a license to search all and any places in the discretion of the officers.

Frisbie v. *Butler*, 1 Kirby 213 (Conn.);[3] Quincy's Mass. Rep. 1761–1772, App. I.

In light of the prejudice against general warrants which I believe Congress shared,[4] I would not allow Mrs.

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[3] The warrant in the *Frisbie* case read in relevant part:

"[Y]ou are commanded forthwith to search all suspected places and persons that the complainant thinks proper, to find his lost pork, and to cause the same, and the person with whom it shall be found, or suspected to have taken the same, and have him to appear before some proper authority, to be examined according to law." 1 Kirby 213–214.

The Court ruled:

"With regard to the warrant—Although it is the duty of a justice of the peace granting a search warrant (in doing which he acts judicially) to limit the search to such particular place or places, as he, from the circumstances, shall judge there is reason to suspect; and the arrest to such person or persons as the goods shall be found with: And the warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal"; *id.*, at 215.

[4] The explicit requirements of the wiretapping provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2510 *et seq.*, and their legislative history manifest a congressional effort to prevent law enforcement agents from proceeding by way of general search warrants. Section 2518 (4) (a), of course, requires that a wiretap authorization order identify the person, if known, whose communications are to be intercepted. Sections 2518 (4) (b) and (c) require that the order also specify the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted, and also particularly describe the type of communication to be intercepted and the particular offense to which it relates. Congress also provided that no order "may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization." 18 U. S. C. § 2518 (5). An authorization order, moreover, must specify that the electronic surveillance "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." *Ibid.*

Before a wiretap order can issue, Title III also demands that law enforcement officers applying for the order provide the judge

Kahn's conversations to be impliedly covered by the warrant, for to do so allows a search of the entire list of outgoing and incoming calls to the Kahn telephones, even though no showing of probable cause had been made concerning any member of the household other than Mr. Kahn.

I cannot believe that Congress sanctioned that practice.

In the first place, though the agents just heard Mrs. Kahn using the phone on March 21 and though they continued their surveillance until March 25, they took no steps to broaden the warrant to include Mrs. Kahn.[5]

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with information describing the offense, the facility, the type of communication, and the identity of the person, if known, committing the offense and whose communications are to be intercepted, 18 U. S. C. § 2518 (1) (b), because in the view of Congress "[e]ach of these requirements reflects the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101. Furthermore, § 2518 (3) requires the judge, before issuing a wiretap order, to find that there is probable cause to believe that an individual is involved with a particular offense, that particular communications concerning that offense will be intercepted, and that specific facilities are being used or about to be used in connection with the commission of such offense, or are leased to, listed to, or commonly used by the individual. Congress inserted these provisions because it felt that, with them, "the order will link up specific person, specific offense, and specific place. Together they are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity." *Id.*, at 102.

See also S. Rep. No. 1097, 90th Cong., 2d Sess., 74–75; 114 Cong. Rec. 14712, 14750 (remarks of Sen. McClellan); *id.*, at 14728 (Sen. Tydings); *id.*, at 14715 (Sen. Tower); *id.*, at 14763 (Sen. Percy); *id.*, at 14748 (Sen. Mundt).

[5] If the statement made by Mrs. Kahn on the telephone March 21 was incriminating, there would be a question whether it could be the basis for obtaining a broadening of the warrant to include her without violating *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. In that case papers had been seized by officers

There was time* to obtain a warrant concerning Mrs. Kahn. I assume that one could have been obtained between March 21 and March 25. Then a judge would have decided the particularity of the search of the Kahn household.

Under today's decision a wiretap warrant apparently need specify but one name and a national dragnet becomes operative. Members of the family of the suspect, visitors in his home, doctors, ministers, merchants, teachers, attorneys, and everyone having any possible connection with the Kahn household are caught up in this web.

I would affirm the judgment below.

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in violation of the parties' Fourth Amendment rights but used by the officials as a basis for demanding in proper form that the owners produce the papers. Mr. Justice Holmes, speaking for the Court, rejected that procedure, saying:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Id.*, at 392.

*Cf. *Johnson* v. *United States*, 333 U. S. 10; *United States* v. *Di Re*, 332 U. S. 581; *Trupiano* v. *United States*, 334 U. S. 699.